Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1096

JERRY LANGELLA,

Petitioner,

v.

COMMISSIONER OF CORRECTIONS,
STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NANCY ROSNER
Attorney for Petitioner
401 Broadway
New York, N.Y. 10013
(212) 925-8844

J. JEFFREY WEISENFELD,
Of Counsel
On the Petition

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 1

Questions Raised 2

Constitutional Provision Involved 2

Statutes Involved 2

Statement of the Case 4

Reasons for Granting the Writ 9

1. The Decision Below Raises Serious and Important Issues Concerning the Proper Construction and Application of 18 U.S.C. §2515 9

2. The Decision below raises serious and important constitutional issues as to whether the same grand jury that heard petitioner's immunized testimony may return an indictment against him for contempt 14

Conclusion 18

APPENDIX

A — Order and Opinion of the United States Court of Appeals for the Second Circuit 1a

B — Order and Opinion of the United States District Court for the Southern District of New York 10a

C — Minutes of Proceedings Before the Third August 1972 Grand Jury December 19, 1972 Testimony of Jerry Langella 24a

TABLE OF AUTHORITIES

Counselman v. Hitchcock, 142 U.S. 457 (1892) 15

Gelbard v. United States, 408 U.S. 41 (1972) 9

Goldberg v. United States, 472 F.2d 513, 516 (2d Cir. 1973) 16

In re Persico, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924; *reh. denied*, 419 U.S. 1060 (1974) 11

Kastigar v. United States, 406 U.S. 441 (1972) 15

Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964) 15

People v. Einhorn, 35 N.Y.2d 948 (1974) 8

United States v. Calandra, 414 U.S. 338, 355 n.11 (1974) 10

United States v. Hinton, 543 F.2d 1002, 1010 (2d Cir. 1976) 17

United States v. Hockenberry, 474 F.2d 247 (3d Cir. 1973) 17

United States v. Marion, 535 F.2d 697, 701 (2d Cir. 1976) 9

Other Authorities

N.Y. Penal Law §215.51 4

28 U.S.C. §1254(1) 2

18 U.S.C. §2515 2

18 U.S.C. §3504 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
No.

JERRY LANGELLA,

Petitioner.

v.

COMMISSIONER OF CORRECTIONS,
STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerry Langella prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 22, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix hereto at pp. 1a-9a*. The opinion of the District Court is reported at 413 F.Supp. 1214 (S.D.N.Y. 1976) and appears in the Appendix at pp. 10a-23a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 22, 1976. A

---

*References are to petitioner's appendix and are designated "a".

timely petition for rehearing was denied on December 1 1976 and the petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS RAISED

1. Whether the procedures employed in the State Court to resolve the issue of whether petitioner was required to answer questions to which he refused to respond on grounds of illegal electronic surveillance complied with the requirements of 18 U.S.C. §2515?

2. Whether the decision below is correct in holding that the same grand jury which heard petitioner's truthful and, therefore, immunized testimony may return an indictment against him for contempt?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

18 U.S.C.

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§3504. Litigation concerning sources of evidence

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as

defined in section 2510(b) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

STATEMENT OF THE CASE

Federal Court Proceedings

On May 12, 1976 the United States District Court for the Southern District of New York (Brieant, J.) denied Mr. Langella's petition for a writ of *habeas corpus* attacking a judgment of the Supreme Court of the State of New York, County of New York (B. Roberts, J.), convicting petitioner, upon his plea of guilty, of criminal contempt in the first degree (N.Y. Penal Law §215.51) and sentencing him to five months imprisonment.

Petitioner appealed the denial to the United States Court of Appeals for the Second Circuit, which court affirmed the denial on November 22, 1976. A timely petition for rehearing was denied on December 1, 1976. On December 21, 1976 the Court of Appeals stayed petitioner's surrender to the state authorities pending the determination of this petition. This stay expired 30 days later and on January 27, 1977 petitioner commenced serving his sentence. A motion for an extension of the stay is presently pending before the Court of Appeals.

State Court Proceedings

Jerry Langella was subpoenaed to appear before a New York County grand jury on December 19, 1972 as a witness in the investigation of a homicide. By his counsel, he moved to quash the subpoena on the ground that the questions to be asked were the product of illegal electronic surveillance.

In an unsworn statement, the prosecutor admitted that Court ordered electronic surveillance had been employed in this investigation but refused to answer whether any of Mr.

Langella's conversations had been intercepted. Petitioner's counsel then moved for an opportunity to inspect the authorizing order but no order was ever produced for the inspection of counsel or for the *ex parte* review of the court. All of petitioner's applications were denied on the sole basis of the prosecutor's unsworn statements.

On the same day, Langella appeared before the grand jury and received transactional immunity (24a-25a). From the outset, Langella, who admitted to less than a complete grade school education (37a), and the prosecutor had some difficulty in communicating. This communication problem necessitated Langella's leaving the grand jury to consult with counsel.

On his return, Langella inquired as to the effect the immunity conferred would fare in federal court or in any other jurisdiction, but the prosecutor never responded to these inquiries (28a-29a, 33a-35a). Langella then responded to questions about his employment, stating that he was a gambler and had no job (34a).

Nor did the witness' difficulties cease with the preliminaries. The very next question was "Did you plan to kill Joseph Gallo on April 7, 1972?" (34a). This thrust for the jugular again moved the witness to ask whether the immunity conferred protected him from federal prosecution, a matter the witness was justly concerned with in light of the highly incriminating subject of the question (34a). His inquiry led to a hot debate among foreman, witness and prosecutor concerning the nature of the witness' right to counsel which culminated with this confused and utterly mistaken, but dogmatic exposition of the witness' rights by the grand jury foreman which was never corrected by the prosecutor:

> "THE WITNESS: But I am not—you know, you're a smart man, why ain't I allowed to go out and ask my question?

THE FOREMAN: You left the room I think twice now to ask questions of your attorney as the District Attorney indicated. If the question is of a legal nature and you do not understand the legality of the question you are entitled to speak to your attorney.

THE WITNESS: Right

THE FOREMAN: But if he asks you your name *or where you were yesterday and what your occupation is* there is nothing legal about that. That required a simple question and a simple answer. (emphasis supplied)

THE WITNESS: Ain't allowed to go out after each question?

THE FOREMAN: No.

THE WITNESS: I'm not?

THE FOREMAN: No.

THE WITNESS: Are you sure, Mr. Foreman? Mr. Tannenbaum, is he correct?

THE FOREMAN: Unless there—

Q The question put to you—

A. Mr. Tannenbaum, is he right?

Q When you become an assistant district attorney and appear in a grand jury you will ask the question. Now you are a witness and the question put to you is did you plan to kill Joseph Gallo on April 7, 1972?

A. The answer is I would like to talk to my attorney." (39a-40a).

Despite the erroneous advice as to his right to confer with counsel, petitioner was ultimately permitted to consult with counsel. After many more questions and exhortations to answer, in the face of which, he steadfastly maintained that

he would answer after an opportunity to consult with counsel. Indeed, upon his return, he did answer several questions directed at him in the intervals between his repeated requests to speak with counsel (49a).

After another go round of several minutes, without speaking with counsel, petitioner was asked and answered:

"Q After April 7, 1972, Mr. Langella, didn't you discuss with Alphonse Persico, inside apartment LK at 1010 Gedney Street in Nyack, New York, the murder of Joseph Gallo?"

A. No, I did not.

Q. You did not discuss the murder of Joseph Gallo with Mr. Persico, is that what you are saying?

A. Yes." (52a-53a).

The next round involved the question:

"Have you been receiving messages from Joseph Gorgone?"* (59a).

After another seemingly endless series of entreaties, petitioner was permitted to speak with counsel (65a-66a). Immediately upon returning to the grand jury room, the witness volunteered the answer to a question which he evidently recollected had been left unanswered earlier in the interrogation (66a).

Petitioner then asked that the pending question be put again and then made a two-fold statement as his counsel had directed, namely that he believed the question regarding the transmission of messages to be the product of electronic surveillance and asked to be brought before a

---

*In fact this individual's tapped phone had been the source of many of the prosecutor's questions and specifically this one. Petitioner's phone conversation with Gorgone had been intercepted on July 20, 1972. Petitioner was only apprised of this interception after his indictment for criminal contempt, in response to his discovery motions.

judge, a perfectly reasonable request made, not once, but more than 15 times (66a-69a).*

Rather than comply with his request, the prosecutor excused Langella from the grand jury room. Langella was never taken before a judge or recalled for further questioning. Instead he was indicted a few days later for failing to answer the questions "whether he visited 101 Gedney Street in Nyack, New York during the month of April, 1972 and, whether inside the apartment LK, at 101 Gedney Street in Nyack, New York, after April 7, 1972, he also spoke with Joseph Luparelli." These were two in a series of questions petitioner had been asked early on in the interrogation (40a, 47a, 50a), most of which were subsequently answered (49a). These two questions were never put again nor was petitioner reminded or warned of the consequence of his failure to answer them before his abrupt departure from the grand jury.

During the course of the proceedings in the trial court Langella moved to dismiss the indictment on several grounds:

1. The prosecutor had not adequately responded to the witness' inquiry concerning electronic surveillance by refusing to respond whether Langella's conversations had been intercepted and by refusing to take Langella before a judge.

2. The witness' truthful and therefore immunized answers had been improperly used by the same grand jury to establish the necessary element of wilfulness to indict him for criminal contempt.*

---

*Interestingly the procedure sought to be employed by petitioner and his counsel is precisely that later adopted by the New York Court of Appeals. See *People v. Einhorn*, 35 N.Y.2d 948 (1975).

**Subsequently, in its Brief in the Appellate Division of the New York Supreme Court, the prosecution conceded that Langella's immunized answers were used to find an element of the offense; arguing that such use was proper, People's Brief to the Appellate Division, pp. 16 through 23.

3. The extent of his immunity was never properly explained to him in violation of the Fifth Amendment.

Langella also moved for discovery and a bill of particulars, in response to which for the first time he received a copy of a transcript of intercepted communications and the court order purporting to authorize its interception. Ultimately, all of Langella's motions were denied and he pled guilty in return for a promise of a sentence of no more than five months incarceration and bail pending appeal. He was sentenced to the maximum under the plea bargain.

Langella's conviction was affirmed in the Appellate Division, First Department without opinion and the Honorable Sol Wachtler denied leave to appeal to the New York Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Serious and Important Issues Concerning the Proper Construction and Application of 18 U.S.C. §2515.

Because of the sensitive privacy right involved and a desire for uniformity in all state and federal jurisdictions, the various provisions of Title III of the Omnibus Crime Control and Safe Streets Acts (18 U.S.C. §§2510-2520) are, by their terms, applicable to the states. 18 U.S.C. §2515 explicitly applies to the states. See also, *Gelbard v. United States*, 408 U.S. 41 (1972); *United States v. Marion*, 535 F.2d 697, 701 (2d Cir. 1976). Under the Supremacy Clause of the Constitution, these statutory protections are cognizable as federal constitutional claims for the purposes of *habeas corpus* jurisdiction. Thus, whether Langella's motion to dismiss the state indictment should have been granted because unlawful electronic surveillance was employed before the grand jury in violation of 18 U.S.C. §2515 is an issue properly before this Court.

A. A grand jury witness who refuses to answer, claiming that the questions asked of him were based upon illegal electronic surveillance, has standing under 18 U.S.C. §2515 to assert that illegality as a defense to a charge of criminal contempt.

The somewhat murky font of all law in this area is this Court's opinion in *Gelbard v. United States, supra.* However, it is clear, that the intent of 18 U.S.C. §2515, as enunciated in *Gelbard* and *United States v. Calandra,* 414 U.S. 338, 355 n. 11 (1974), is that a grand jury witness may defend a contempt indictment where his interrogation was based upon unlawful electronic surveillance. Having taken the risk by refusing to answer, §2515 provides the alleged contemnor full vindication, if unlawful electronic surveillance was indeed employed in his questioning. *Gelbard v. United States, supra*; *United States v. Calandra, supra* at 355 n. 11.

B. The procedures followed in the state court did not comply with the requirements of §2515.

Below, the Court of Appeals held that §2515 imposes upon the states the obligation to formulate procedures sufficient to effectuate the purposes of §2515 (6a). This effect of §2515 is, of course, entirely independent of the statutory codification contained in 18 U.S.C. 3504, which is applicable only to the federal government. Thus, a state must implement its procedures for raising at §2515 claim in a manner which does not impair that federally guaranteed right. Here, the New York procedures upheld by the courts below do not meet the required standards of §2515.

The Court of Appeals stated:

> In *People v. Einhorn,* 35 N.Y.2d 948 (1974) (per curiam), the New York Court of Appeals set out the procedure to be followed by a grant jury witness

> who claims the questions being posed violate 18 U.S.C. §2515: "The request during the grand jury proceeding by the witness that he be brought before the court must be respected and once there the Presiding Justice may make appropriate inquiry whether the witness' objection is sound." *Id.*, 949. The New York procedure, as set out in *Einhorn,* complies with 18 U.S.C. §2515. (6a).

and further:

> Justice Sandifer's denial of Langella's pre-appearance motion, on the prosecutor's assurance of the existence of a court order for the electronic surveillance, essentially meets the requirements of *Einhorn* and constitutes a sufficient accommodation of the needs of the grand jury with those of the witness (7a).

If the Second Circuit was saying that the New York procedure merely satisfied minimum federal standards, this would permit a variance in procedure between not only the various states but between the states and the federal government. In light of the clear intent to promote uniformity, this holding would frustrate a prime policy of Congress.

Aside from the matter of uniformity, the procedure followed by the state court before petitioner's grand jury appearance and the procedure followed by the prosecutor in the grand jury can hardly be said to meet the requirements of §2515.

The Second Circuit has held that under §2515, a witness refusing to answer based upon a claim that the questions posed were the fruit of illegal electronic surveillance can receive a suppression hearing during the grand jury proceedings only if (1) there is no valid court order for the surveillance, (2) the government concedes the illegality of the surveillance, or (3) there is a prior judicial determination that the surveillance was illegal. *In re Persico,*

491 F.2d 1156 (2d Cir.), *cert. denied.* 419 U.S. 924; *reh. denied.* 419 U.S. 1060 (1974). Here, to avoid holding such a hearing, the prosecution attempted to establish the existence of a prior court order authorizing the surveillance.

The only proof on the issue was the unsworn statement of the assistant district attorney that such a judicial order existed. The prosecutor was not examined under oath, nor was he required to respond adequately to petitioner's request that he be informed if his conversations had been intercepted, nor did the court inspect the wiretap order *in camera.* See, *In re Persico, supra.*

To say the above was a sufficient inquiry under §2515 is to promote form over substance.* The reason for requiring a "sufficient" inquiry is to afford a witness a reasonable basis upon which to decide whether to remain silent and later assert §2515 as a defense to a contempt charge. The procedure followed here was so insubstantial, that it cannot afford a proper basis for decision and as such, it does not conform to the requirements of §2515.

Further, Langella's efforts to implement his rights under §2515 were completely and pointlessly frustrated by the prosecutor's refusal to respond, until after indictment, to the inquiry whether Langella's conversations had been intercepted during the course of electronic surveillance.

Here too, it is appropriate to remember that without the necessary information, a witness is left entirely without the foundation to judge whether to assert his claim of illegal surveillance. Since the purpose of §2515 is to prevent the use in the grand jury of illegal interceptions, it is essential to the statutory scheme that those who are the victims of

---

*The procedure of permitting a prosecutor to merely state that there is an order is just too subject to error or inaccuracy to be sound. There is no need to continue such procedures when it is so easy for the prosecutor to supply the court with a copy of the order for its *in camera* inspection.

such illegality be able to make an intelligent and knowing decision to assert or withdraw the claim.

The Court of Appeals further held that Langella waived his claim by failing to request that he be brought before the judge as to each and every particular question which remained unanswered. The Court of Appeals decision can only result in requiring a witness to make such a request to each and every question or face the prospect of forfeiting the protection of §2515. This is so because, on its face, a question predicated on electronic surveillance might not indicate its source. That is, the fact that surveillance was the root of a question might not be evident so that a cautious and prudent witness *must* request that he be brought before a judge on each and every question or risk losing his right. This is precisely what happened here. Petitioner's request was triggered by a question which referred to "transmitted messages" which he did not answer and for which he was not indicted. Instead, he was indicted for refusing to answer two questions which lacked internal clues of their eavesdropping origin and hence, triggered no inquiry by the witness. To compound the utter unfairness of the procedure approved here, the two questions upon which the indictment was based *preceded* the question about transmitted messages, which triggered Langella's unfulfilled request to be brought before a judge.

Such a procedure has implications so disruptive of the orderly and expeditious progress of grand jury proceedings that this Court must ultimately condemn it. To require a witness to assert his §2515 claim as to each question asked serves no useful purpose; in fact, it undercuts the policy behind that statute by making the grand jury proceeding a trap for contempt.

The opinion of the Second Circuit endorsing the requirement stands as ground breaking precedent not only for the 50 states to which §2515 by its terms applies, but also to federal jurisdictions, for the Second Circuit opinion

is ambiguous as to whether it reaches federal grand juries as well. Until this ambiguity is resolved, any attorney who has read the Langella opinion and who represents a witness before a federal grand jury must advise his client to make such a request as to each question posed. This procedure will result in frustrating the purposes of the grand jury as well as force a witness to indulge in empty formalisms to protect himself. Further, the entire process is demeaning to all the parties involved.

Moreover, if the ambiguity as to scope is resolved that the holding reaches only state courts, then again the policy of uniformity of procedure is frustrated.

This is a case of first impression in the federal circuits and the holding of the Court of Appeals misconstrues the proceedures contemplated by §2515. This misconstruction should be rectified by this Court's grant of certiorari.

2. The Decision below raises serious and important constitutional issues as to whether the same grand jury that heard petitioner's immunized testimony may return an indictment against him for contempt.

Pursuant to New York law, petitioner was granted transactional immunity upon being sworn as a witness before the grand jury. In the course of his appearance, he gave truthful and therefore, immunized testimony, stating that he was a professional gambler and was a close friend of Alphonse Persico, an individual allegedly involved in the murder under investigation. Langella further testified that he did not plan to kill Joseph Gallo on April 7, 1972, that since April 7, 1972 he had not spoken to Carmine Di Biase, and, that after April 7, 1972 he did not discuss with Persico the murder of Joseph Gallo. The same grand jury which heard this immunized testimony, later indicted Langella for contempt for failing to answer certain questions.

The use by the grand jury of this immunized testimony was conceded by the prosecution in its brief to the New York Appellate Division, in which it argued that such use was proper. (People's brief to the Appellate Division, pp. 22-23).

The Court of Appeals held that it was proper for the same grand jury which heard Langella's truthful, immunized testimony to indict him for contempt. This is, apparently, the first circuit court decision to sanction such a procedure.* Petitioner contends that this procedure violated his Fifth Amendment rights and asks this Court to review the decision below.

The Fifth Amendment privilege against self incrimination makes ours an accusatorial rather than an inquisatorial system of justice. *Kastigar v. United States*, 406 U.S. 441 (1972). Therefore, it must be maintained inviolate and may not be displaced except by immunity perfectly co-extensive with it. *Counselman v. Hitchcock*, 142 U.S. 457 (1892); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964); *Kastigar v. United States, supra*. Thus, the issue herein is the right of petitioner to be free from the use of his immunized testimony against him in a criminal prosecution.

In the circumstances of this case, it is impossible for the prosecutor to furnish the degree of proof *Kastigar, supra*, requires. *Kastigar*, after all, proscribed "any use, direct or indirect . . ." of the immunized testimony in a criminal proceeding. Indeed, if the immunity protection is to be coextensive with the Fifth Amendment privilege, as it must to be constitutionally sufficient, then it must forbid *all* prosecutorial use of the compelled testimony, not merely

---

*It must be remembered, that we are here dealing with criminal contempt and not civil contempt, which is used remedially and not to punish the witness.

that which results in the presentation of evidence to a petit jury. Petitioner must be left "in substantially the same position as if [he] had claimed the Fifth Amendment privilege." *Kastigar, supra,* at 462.

Thus, the prosecution must affirmatively show that it did not use against petitioner his immunized testimony or its fruits "in any respect." *Kastigar, supra.* In the present case, however, this is not possible, since the prosecution has conceded the use of this testimony and further has asserted that such use was proper. Even if such a concession had not been made, the prosecution could not meet its burden, for as lower courts have repeatedly held, once the immunized testimony has been heard "it would be well nigh impossible for the grand jurors to put [his] answers out of their minds. . . . " *Goldberg v. United States,* 472 F.2d 513, 516 (2d Cir. 1973).*

As the Second Circuit itself recently held,

> . . . for us to condone the practice of having the same grand jury that heard the immunized testimony indict the witness who so testified is to invite action where the cure is worse than the malady. The prospect of peering into the grand jurors' minds, or of examining them individually, to ascertain whether Hinton's testimony was improperly used, is both impractical and unpalatable. To so defile the secrecy of the grand jury process is to compound the problem the Government has created, rather than to alleviate it. The alternative of convening a grand jury distinct from that which heard the immunized testimony is not so onerous as to justify the jeopardizing of a defendant's Fifth Amendment rights.

---

*See also, *United States v. Dornau,* 359 F.Supp. 684, 687 (S.D.N.Y. 1973), *rev'd on other grounds,* 491 F.2d 473 (2d Cir. 1974); *United States v. McDaniel,* 482 F.2d 305, 312 (8th Cir. 1973).

U.S. v. Hinton, 543 F.2d 1002, 1010 (2d Cir. 1976) (footnotes omitted). In *Hinton,* the court reversed the conviction of a defendant who gave immunized testimony before the same grand jury that later indicted her for conspiracy to violate the federal narcotics laws.

Here, the Court of Appeals affirmance was based on an analogy to a recent case, *United States v. Camporeale,* 515 F.2d 184, 189 (2d Cir. 1975), which affirmed the practice of permitting the same grand jury which heard the witness to indict him for perjury. Petitioner contends that such analogy is misleading and incorrect. Here, truthful and, therefore, immunized testimony of Langella was used to prove the contempt. In *Camporeale,* there was no indication that Camporeale's truthful testimony was relied upon to prove the perjury. *Camporeale* dealt only with the use by the grand jury of false and, therefore, unimmunized testimony. The Court of Appeals' reliance upon *Camporeale* to support the use by this grand jury of immunized testimony is entirely misplaced, for truthful answers given under a grant of immunity cannot be used in any way in a criminal prosecution against that witness. *United States v. Hockenberry,* 474 F.2d 247 (3d Cir. 1973).

In simplest terms, the witness was promised that if he answered questions truthfully, they would not be used against him in a criminal prosecution. With this assurance he confessed himself a gambler and associate of suspect persons, and he answered substantive questions concerning his participation in the planning of the murder under investigation. The probity of these facts is apparent and their use by the grand jury is conceded. Thus, Langella's Fifth Amendment rights were violated.

This Court should grant the petition for a writ of certiorari to review the constitutionality of such grand jury procedure under the Fifth Amendment and to reaffirm the requirement of *Kastigar* that immunized testimony may not, in a criminal prosecution, be used in any way against a witness.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED, THE JUDGMENT BELOW REVERSED, AND THE WRIT OF HABEAS CORPUS GRANTED.

Respectfully submitted,

NANCY ROSNER
Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 83—September Term, 1976.

(Argued September 13, 1976 Decided November 22, 1976.)

Docket No. 76-2050

JERRY LANGELLA,

Petitioner-Appellant,

v.

COMMISSIONER OF CORRECTIONS, STATE OF NEW YORK,

Respondent-Appellee.

Before:

SMITH, OAKES and MESKILL,

Circuit Judges.

Appeal from denial of petition for a writ of habeas corpus by the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge.* Appellant was convicted in state court on plea of guilty to criminal contempt for refusing to answer questions posed by a New York grand jury, and attacks his conviction as in violation of 18 U.S.C. § 2515 and the fifth amendment.

Affirmed.

NANCY ROSNER, New York, N.Y., *for Appellant.*

HENRY J. STEINGLASS, Assistant District Attorney (Robert M. Morgenthau, District Attorney, New York County, Peter L. Zimroth, Assistant District Attorney, of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

Jerry Langella appeals the denial of his petition for a writ of habeas corpus by the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge.* Langella argues that his conviction for criminal contempt for refusing to answer the questions of a New York grand jury violates 18 U.S.C. § 2515 and the fifth amendment. We affirm.

I.

In 1972 Langella was subpoenaed to appear before a New York County grand jury investigating the death of Joseph Gallo in April, 1972. On December 19, 1972 Justice Jawn Sandifer, Supreme Court (New York), denied Langella's motion to quash the subpoena. The motion was based on a claim that the questions to be asked by the grand jury were the product of illegal electronic surveillance. Justice Sandifer, on the prosecution's representation that a court surveillance order had been obtained, rejected Langella's request that a hearing be held.

On the same day Langella appeared before the grand jury and was given "transactional" immunity.[1] While he

1 [Y]ou are a witness in this legal proceeding and you cannot be convicted of any offense or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which you give evidence in this legal proceeding. You possess immunity from any such conviction, penalty or forfeiture. However, even though you possess such immunity you may nevertheless be convicted of perjury as a result of having given false testimony in this legal proceeding and you may be convicted of or adjudged in contempt as a result of having contumatiously [sic] refused to give evidence. I further tell you that this grand jury proceeding is a legal proceeding and to give evidence here means to testify or to produce physical evidence.

Statement of Immunity.

answered some questions, Langella refused, after consulting with his attorney, to answer other questions, and on January 16, 1973 he was indicted, pursuant to New York Penal Law § 215.51 (McKinney 1975), for criminal contempt for refusing to answer two questions.[2] In June, 1975 Justice George Roberts, Supreme Court (New York), denied Langella's motion to dismiss the indictment, and on June 18, 1975 Langella pleaded guilty. On July 24, 1975 he was sentenced to five months' imprisonment.

On March 4, 1976 the Appellate Division, First Department, affirmed his conviction without opinion, and April 13, 1976 the New York Court of Appeals denied leave to appeal.

Langella then filed a petition for a writ of habeas corpus, which Judge Brieant denied on May 12, 1976. On appeal Langella claims that the grand jury's questions were derived from illegal electronic surveillance in violation of 18 U.S.C. § 2515[3] and that it is a violation of the fifth

---

2 Langella was indicted for refusing to answer "whether he visited 101 Gedney Street in Nyack, New York during the month of April, 1972; and, whether inside the apartment LK, at 101 Gedney Street in Nyack, New York, after April 7, 1972, he also spoke with Joseph Luparelli."

3 18 U.S.C. § 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

amendment for the same grand jury that heard his immunized testimony later to indict him for contempt.

II.

Before reaching the merits of Langella's claims, we must deal with New York's vigorous argument that this court cannot consider these claims because they were not presented to the United States District Court, because Langella by-passed the New York courts, and because he pleaded guilty. The first two arguments are without merit. Judge Brieant's opinion indicates that the issues were fully presented to the district court. Justice Roberts' opinion and the brief Langella presented to the Appellate Division indicate that the substance of these issues was also presented to the New York courts. *Picard* v. *Connor*, 404 U.S. 270, 278 (1971).

On the third contention, relying on *People* v. *Melton*, 35 N.Y.2d 327, 329 (1974), and *People* v. *Lynn*, 28 N.Y.2d 196, 201-03 (1971), New York argues that under New York law Langella's claims are not reviewable in New York on appeal after a guilty plea and thus, under *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975), Langella is foreclosed from pursuing these claims in a federal habeas corpus proceeding.

Both *Melton* and *Lynn*, however, involve appeals from a *coram nobis* proceeding in which the defendant initially failed to appeal after pleading guilty. *People* v. *Gleeson*, 354 N.Y.S.2d 207, 208 (App. Div. 1974), *rev'd on other grounds*, 36 N.Y.2d 462 (1975), holds that despite a guilty plea a defendant retains his right to appeal the denial of his suppression motion, pursuant to New York Criminal Procedure Law (NYCPL § 710.70(2) (McKinney 1971).

Judge Brieant held that under *Lefkowitz*, Langella's plea of guilty did not foreclose his pursuing his claims in a federal habeas corpus proceeding. See also *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam). *Lefkowitz* involved

a fourth amendment claim, and *Menna* involved a fifth amendment claim. We agree with Judge Brieant that NYCPL § 710.20(2) and § 710.70(2)[4] permit Langella to challenge the legality of the electronic surveillance and that NYCPL § 210.20(1)(c) and § 210.20(1)(d)[5] (McKinney 1971), permit him to challenge the same grand jury's hearing his testimony and then indicting him.[6]

---

4 NYCPL § 710.20(2) provides:

> Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:
>
> . . .
>
> 2. Consists of a record or potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping, obtained under circumstances precluding admissibility thereof in a criminal action against such defendant . . . .

NYCPL § 710.70(2) provides:

> An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

5 NYCPL § 210.20(1)(c) and (1)(d) provide:

> 1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that:
>
> . . .
>
> (c) The grand jury proceeding was defective, within the meaning of section 210.35; or
>
> (d) The defendant has immunity with respect to the offense charged, pursuant to section 50.20 or 190.40.

6 *Tollet* v. *Henderson*, 411 U.S. 258, 266 (1973), holds that a guilty plea precludes a federal habeas corpus claim that the composition of the indicting grand jury violated the fourteenth amendment. *Blackledge* v. *Perry*, 417 U.S. 21, 30 (1974), explains that in *Tollet* the tainted indictment "could have been 'cured' through a new indictment by a properly selected grand jury." Here Langella argues that there must be both a new grand jury and redaction of his truthful immunized answers.

III.

In *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924, *reh. denied*, 419 U.S. 1060 (1974), we held that under 18 U.S.C. § 2515 a witness before a federal grand jury is not entitled to a suppression hearing during the grand jury's proceedings unless (1) there is not a valid court order for the electronic surveillance, (2) the government concedes the surveillance is illegal, or (3) there is a prior judicial determination that the surveillance was illegal. *Id.*, 1162. Section 2515 also applies to a witness before a state grand jury. *United States* v. *Marion*, 535 F.2d 697, 701 (2d Cir. 1976).

Langella relies on the first exception set out in *Persico*. At the December 19, 1972 hearing the prosecutor told Justice Sandifer that Langella's attorney "inquired of me whether or not there was electronic eavesdropping. The people told them [sic] that it was. In addition I told them that we had a Court order" (A. 22). Langella's attorney asked the court to determine whether "all the questions to be asked by the government are based only on lawful interceptions, and not on any other unlawful interceptions" (A. 25). Justice Sandifer denied this request.

In *People* v. *Einhorn*, 35 N.Y.2d 948 (1974) (per curiam), the New York Court of Appeals set out the procedure to be followed by a grand jury witness who claims the questions being posed violate 18 U.S.C. § 2515: "The request during the Grand Jury proceeding by the witness that he be brought before the court must be respected and once there the Presiding Justice may make appropriate inquiry whether the witness' objection is sound." *Id.*, 949. The New York procedure, as set out in *Einhorn*, complies with 18 U.S.C. § 2515.

When the grand jury asked Langella whether he had been receiving messages from Joseph Gorgone about the

murder of Joseph Gallo, Langella, after consulting for the fourth time with his attorney, asked whether the question was based on electronic surveillance and requested that he be taken before a judge. His request was denied. Upon his continuing to be recalcitrant and to request that he be taken before a judge, he was excused by the grand jury. But the two questions for which Langella was held in contempt were asked earlier in the grand jury proceedings (A. 49, 61, 65, 69-70, 71, 75-77). Although he had already consulted three times with his attorney, Langella never told the grand jury that his refusal to answer these two questions was based on his claim that they were the product of an illegal electronic surveillance.

The hearing here occurred before *Einhorn*, which would today govern the procedure in the New York courts in a similar case. Justice Sandifer's denial of Langella's preappearance motion, on the prosecutor's assurance of the existence of a court order for the electronic surveillance, essentially meets the requirements of *Einhorn* and constitutes a sufficient accommodation of the needs of the grand jury with those of the witness. *Gelbard* v. *United States*, 408 U.S. 41, 70 (1972) (White, *J.*, concurring). Moreover, Langella failed thereafter to make a timely request for further determination as to the source of the two questions which were the subject of the contempt indictment. The court had been informed that the surveillance was pursuant to court order and denied the motion. Later Langella refused to answer the question on which the indictment for contempt was based, until he could see his lawyer. After consulting his lawyer, he persisted in evading answers, but not on any claim the questions were based on illegal surveillance. Later, after being asked about one Gorgone, a/k/a Black, he asked to see a judge to determine whether that question arose from illegal surveillance. Here there was a sufficient compliance with the requirements of *Ein-*

horn on the earlier motion, and nothing new was raised before the grand jury to require a new hearing as to the source of the particular questions the witness refused to answer, which refusal was the basis of the contempt conviction.

IV.

Langella claims that his indictment by the same grand jury that heard his immunized testimony violates the fifth amendment. He argues that *Kastigar* v. *United States*, 406 U.S. 441 (1972), puts the burden on the government to show that the immunized testimony was not the basis of the subsequent indictment and that it is impossible to meet this burden when the grand jury which hears his truthful but highly prejudicial answers to some of its questions[7] also indicts for contempt. His proposed solution is to have a different grand jury examine the transcript of his testimony, with all the truthful answers being redacted.

One problem with this proposed solution is that in deciding on a charge of criminal contempt, the second grand jury would also want to know the extent of his answers to questions. To be guilty of contempt under New York Penal Law § 215.51 a "witness need not flatly refuse to answer the questions put to him; false and evasive profession of an inability to recall, which amounts to no answer at all, is punishable as criminal contempt." *People* v. *Ianniello*, 36 N.Y.2d 137, 142 (1975).

In *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975), we affirmed "the settled practice of permitting the same grand jury which heard the witness to file an indictment charging him with perjury. Having had the opportunity to observe his demeanor on the stand, it was

7 Langella told the grand jury that he was a gambler, that he had not filed income tax returns for a number of years, and that he was the bodyguard of Alphonse Persico.

in a superior position to determine whether there were reasonable grounds to believe that he was deliberately giving false [immunized] testimony. The grand jury's knowledge of a witness' prior criminal record, furthermore, should not preclude its filing the indictment, which merely represents a charge." We think similar considerations warrant having the same grand jury return the indictment for criminal contempt,[8] especially where, as here, the charged contempt involved refusal to answer, not any crime revealed in the immunized answers.

Affirmed.

8 In *United States* v. *Hinton*, —— F.2d ——, slip op. 5679 (2d Cir. Sept. 27, 1976), this court held that it was reversible error for the same federal grand jury which heard Hinton's immunized testimony in 1973 concerning narcotics transactions to indict her in 1975 for violating federal narcotics laws. We noted that Hinton's appeal did not involve perjury or contempt. *Id.*, 5692 n. 9.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JERRY LANGELLA,
Petitioner.

v.

COMMISSIONER OF CORRECTIONS,
STATE OF NEW YORK,
Respondent.

No. 76 Civ. 1790-CLB.

May 12, 1976.

State prisoner who, upon his plea of guilty, was convicted of criminal contempt in the first degree filed petition for writ of habeas corpus. The District Court, Brieant, J., held that the state prosecutor's oral representation, in response to petitioner's motion to quash grand jury subpoena on ground that the questions likely to be asked of him were derived from unlawful electronic surveillance, that such surveillance was employed, but was conducted pursuant to court order, was constitutionally sifficient even if a different procedure would be required of federal prosecutors; that there was no reason why the grand jury before whom petitioner testified under a grant of immunity could not thereafter indict him for contempt, based in part on the jurors' own observation of his demeanor while refusing to answer questions; that where petitioner admitted having committed the offense of criminal contempt, he thereby waived any objection that the indictment was founded on insufficient evidence and was a result of bias or prejudice of the grand jurors; and that petitioner's claim that he was deprived of his right to confer with counsel

during his appearance before grand jury was unsubstantiated by the record.

Petition denied.

1. Habeas Corpus — 25.1(1)

When state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding. 28 U.S.C.A. §2254.

2. Habeas Corpus — 30(1)

Although petitioner pleaded guilty to charge of criminal contempt in the first degree, he was not precluded from raising, on petition for federal writ of habeas corpus, claims that he was denied his right not to be compelled to answer, before state grand jury, questions derived as a result of unlawful electronic surveillance, that his Fifth Amendment rights were abridged when he was indicted for contempt by the same grand jury which heard testimony he had given under a grant of immunity, and that he was denied his Sixth Amendment right to counsel when he was not permitted to consult with his attorney during his interrogation before the grand jury. Penal Law N.Y. §215.51; 28 U.S.C.A. §2254; 18 U.S.C.A. §2515; U.S.C.A. Const. Amends. 4-6.

3. Grand Jury — 36

State prosecutor's oral representation, in response to petitioner's motion to quash grand jury subpoena on ground that the questions likely to be asked of him were derived from unlawful electronic surveillance, that such surveillance was employed, but was conducted pursuant to court order, was constitutionally sufficient even if a different procedure would be required of federal prosecutors. 18 U.S.C.A. §2515.

5. Grand Jury — 36

Power of criminal contempt is lawfully available in aid of a state grand jury's investigations. Penal Law N.Y. §215.51.

6. Grand Jury — 36

Any grand jury that would consider whether an accused committed criminal contempt would have to determine that there was probable cause to believe he refused to answer a "legal and proper interrogatory" and refused with the requisite criminal intent, i.e., "contumaciously and unlawfully." Penal Law N.Y. §215.51.

7. Grand Jury — 36

Since any grand jury could consider in its entirety the transcript of petitioner's grand jury appearance to determine the propriety of the questions which he refused to answer, and whether he acted with specific criminal intent, there was no reason why the grand jury before whom petitioner testified under a grant of immunity could not thereafter indict him for contempt, based in part on the jurors' own observation of his demeanor while refusing to answer questions. Penal Law N.Y. §215.51.

8. Indictment and Information — 196(3)

Where petitioner admitted having committed the offense of criminal contempt, he thereby waived any objection that the indictment was founded on insufficient evidence and was a result of bias or prejudice. Penal Law N.Y. §215.51.

9. Grand Jury — 36

Petitioner's claim that he was deprived of his right to confer with counsel during his appearance before the grand jury was unsubstantiated by the record, which indicated that at no point did petitioner answer any question without

having the opportunity to confer with counsel. U.S.C.A. Const. Amend. 6.

Nancy Rosner, New York City, for petitioner.

Robert M. Morgenthau, Dist. Atty., by Henry J. Steinglass, Asst. Dist. Atty., New York City, for respondent.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

Upon his plea of guilty, petitioner was convicted in the Supreme Court of the State of New York, New York County on July 24, 1975, of criminal contempt in the first degree, N.Y. Penal Law §215.51. Petitioner was sentenced to a term of five months imprisonment.[1] He was permitted to continue on bail pending review by the state appellate courts. The Appellate Division of the Supreme Court, First Department, affirmed the judgment of conviction and the New York Court of Appeals denied petitioner leave to appeal. Petitioner, having exhausted his state remedies, seeks a writ of habeas corpus, pursuant to 28 U.S.C. §2254.[2]

---

1. Since petitioner was sentenced to a term of five months imprisonment, he would not be remanded to the custody of the Commissioner of Corrections of the State of New York. Rather, he would serve his sentence in the custody of the correctional system of the City of New York. Process here has been served upon both City and State officials, and the District Attorney of New York County has entered a general appearance, waiving whatever defect there may be in naming the appropriate party respondent.

2. Petitioner brought on his motion by order to show cause, issued April 20, 1976, the date on which he was to surrender to State custody. A stay of surrender was granted pending hearing of this motion and was thereafter extended pending its determination. To expedite consideration of this petition, both sides agreed to submit the merits of the controversy upon briefs filed on direct appeal with the Supreme Court of the State of New York, Appellate Division. An evidentiary hearing was waived. There are no disputed factual issues.

Petitioner attacks his conviction on three separate constitutional grounds. First, petitioner contends that he was denied his right not to be compelled to answer before a State grand jury, questions that were derived as a result of unlawful electronic surveillance. Petitioner contends that this right is derived from 18 U.S.C. §2515 and the Fourth and Fifth Amendments of the United States Constitution. Second, petitioner contends that his Fifth Amendment rights were abridged when he was indicted for criminal contempt by the same grand jury that heard testimony he had given under a grant of immunity. Finally, petitioner contends that he was denied his Sixth Amendment right to counsel when he was not permitted to consult with his attorney during his interrogation before the grand jury.

[1, 2] At the outset, respondent contends that since petitioner pleaded guilty, and there is no explicit statutory right to reserve his objections, these objections were waived by his plea and therefore this Court is barred from considering them. *Lefkowitz v. Newsome*, 420 U.S. 283, 293, 95 S.Ct. 886, 891, 43 L.Ed.2d 196 (1975), held that

> "When state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding."

In *Newsome*, the Court found that New York Criminal Procedure Law ("N.Y.C.P.L."), §§710.20(1) and 710.70(2) permitted a defendant, after pleading guilty, to appeal the denial of his motion to suppress evidence allegedly obtained as a result of an unlawful search and seizure. Accordingly, there was no bar to consideration of these claims upon a petition for a federal writ of habeas corpus.

Petitioner's claim that he was compelled to answer questions derived from unlawful electronic surveillance is similar to the Fourth Amendment claim raised in *Newsome*. Although petitioner could not move to suppress

this alleged fruit of the poisonous tree, petitioner did invoke his federal constitutional and statutory rights with regard to the alleged wiretap information.

Similarly, petitioner's second claim, that he was deprived of his Fifth Amendment rights because the same grand jury heard his immunized testimony and later indicted him for contempt, is not barred. The issue raised here is whether this particular grand jury, in accordance with law, could return this indictment. New York permits a defendant to move to dismiss the indictment after his plea of guilty if "[t]he grand jury proceeding was defective, within the meaning of [N.Y.C.P.L. §] 210.35" or if [t]he defendant has immunity with respect to the offense charged, pursuant to section 50.20 or 190.40." N.Y.C.P.L. §§210.20(1)(c), (1)(d), (2).

Petitioner moved to dismiss the indictment, which motion was denied in June 1975, and shortly thereafter, on June 18, 1976, he pleaded guilty. There was no doubt but that petitioner refused to answer the questions propounded, and the only issues raised were issues of law, whether there was just cause for the petitioner's refusal to answer. When the issues of law were decided adversely to petitioner, there were no issues remaining for trial. These legal issues provide fair ground for litigation and the Court declines to view petitioner's plea of guilty as a waiver of the constitutional claims that he sought to raise in the state courts. We therefore proceed to a consideration of the merits of petitioner's claims.

Petitioner was subpoenaed to testify under a grant of immunity before the State grand jury investigating the 1972 murder of one Joseph Gallo, an organized crime figure who was shot in an early morning restaurant killing. Petitioner moved to quash the subpoena on the ground that the questions likely to be asked of him were derived from unlawful electronic surveillance. In the course of the hearing on the motion to quash, the Assistant District

Attorney stated that there had been electronic eavesdropping conducted in the investigation of this case, but that this had been done pursuant to an eavesdropping warrant issued by the Court. The prosecutor also stated that he had so informed petitioner's prior counsel on a previous occasion (A-22-23).[3] The Court denied petitioner's motion to quash the subpoena. Petitioner raised the same argument upon his motion to dismiss the contempt indictment, which motion was also denied.

|3| Petitioner relies upon 18 U.S.C. §2515 and *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972). *Gelbard* held that §2515 was available as a defense to a contempt charge, and that a grand jury witness may refuse to answer questions derived from unlawful electronic surveillance. In *Gelbard* and its companion case, *United States v. Egan*, the issue arose as a defense to a contempt charge, and not upon motion to quash a grand jury subpoena. Neither *Gelbard* nor §2515 require the state court to quash a grand jury subpoena upon the speculation that the questions to be asked are derived from a tainted source. 408 U.S. at 60-61, 92 S.Ct. 2357.

Petitioner contends that a mere statement by the prosecutor that electronic surveillance was conducted pursuant to court order is an insufficient response and that therefore §2515 bars an adjudication of contempt. Justice White in a concurring opinion provided the decisive vote for the majority in *Gelbard*. Obviously concerned lest a recalcitrant witness be empowered to obstruct the lawful investigations of a grand jury, Justice White concluded:

> "Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there

3. Page references are to pages as numbered in Appellant's Brief and Appendix in the Supreme Court, Appellate Division.

> may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best. It is well, therefore, that the Court has left this issue open for consideration by the District Court on remand." *Id.*, at 70, 92 S.Ct. at 2372.

In accord with Justice White's views, *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924, 95 S.Ct. 199, 42 L.Ed.2d 158 (1974), upheld an adjudication of civil contempt where a grand jury witness refused to answer questions derived from court-ordered electronic surveillance. The trial court declined to conduct a suppression hearing but did examine the orders *in camera* and determined that they appeared proper on their face. In affirming the adjudication, the Court said:

> "We hold that in contempt proceedings initiated when a witness who has been granted 'derivative use' immunity refuses to answer questions propounded by a grand jury because he claims he is entitled to a hearing to ascertain whether the questions posed are the product of unlawful electronic surveillance the witness is not entitled to a plenary suppression hearing to test the legality of that surveillance. We hold that the refusal would be permissible only if there is an absence of a necessary court order or if there is a concession from the Government that the surveillance was not in conformity with statutory requirements or if

there is a *prior* judicial adjudication that the surveillance was unlawful." [Emphasis in original] 491 F.2d at 1662.

The procedure devised by the District Court in *Persico*, of examining the court order *in camera* has been approved and followed by other federal courts. See *Droback v. United States*, 509 F.2d 625 (9th Cir. 1974), *cert. denied* 421 U.S. 964, 95 S.Ct. 1389, 43 L.Ed.2d 650 (1975); *In re Grand Jury Proceedings — United States v. Worobyzt*, 522 F.2d 196, *rehearing denied* 525 F.2d 693 (5th Cir. 1975).

Concededly, a facial examination of the court order may not reveal whether there was in fact probable cause for the issuance of the order, or whether the order was executed according to its terms, observing "minimization" and respecting privileged communications. Nevertheless, this procedure strikes a necessary balance between the rights of the witness and the needs of the grand jury.

[4] Although a federal district court may be required to follow the *Persico* procedure, neither *Gelbard* nor federal statute requires that state courts observe a similar procedure. The state prosecutor's oral representation that electronic surveillance was employed, but conducted pursuant to court order, was constitutionally sufficient even if a different procedure would be required of federal prosecutors.[4]

[5] We are mindful that *In re Persico* and other federal cases arose upon an adjudication of civil contempt, pursuant to 28 U.S.C. §1826, during ongoing investigations by the grand jury. Here, the contempt was committed on December 19, 1972; petitioner was indicted on January 16,

4. Although by its terms 18 U.S.C. §2515 applies both to federal and state grand jury proceedings, 18 U.S.C. §3504 applies only to federal proceedings. Therefore, the gloss placed on that statute in cases where federal prosecutors deny the use of electronic surveillance does not apply here. *Cf.. United States v. Grusse*, 515 F.2d 157 (2d Cir. 1975); *In re Buscaglia*, 518 F.2d 77 (2d Cir. 1975); *United States v. Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974).

1973, and the charge was not disposed of until petitioner's plea of guilty on June 18, 1975. Clearly, the disruption of the grand jury proceedings that would have been occasioned by a plenary suppression hearing is not the same as where the power of civil contempt is used to coerce the giving of testimony before a sitting grand jury. The very delay in the prosecution of these charges supports this conclusion. Nevertheless, the power of criminal contempt is lawfully available in aid of the state grand jury's investigations. Threatened with the possibility of a subsequent criminal prosecution, a witness will be more inclined to obey the lawful orders of the Court and grand jury. The determination of lawfulness required by *Gelbard* must be prompt even in this context, so that a witness may guide his conduct before the grand jury accordingly.

The second ground raised by petitioner is that the Fifth Amendment privilege against self-incrimination barred his indictment for criminal contempt by the same grand jury which heard his testimony under a grant of immunity. The New York Court of Appeals, considering other constitutional objections, has upheld the procedure followed here. *People v. Mulligan*, 29 N.Y.2d 20, 323 N.Y.S.2d 681, 272 N.E.2d 62 (1971). See also *People v. Ward*, 37 App.Div.2d 174, 323 N.Y.S.2d 316 (1st Dept.1971).

[6] Section 50.10(1) of the N.Y.C.P.L. provides:

"A person who possesses . . . immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein."

See N.Y.C.P.L. §§190.35, 190.40. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) held that 18 U.S.C. §6002, which granted more limited use immunity, was coextensive with the Fifth Amendment privilege although it too permitted prosecution for contempt. Since petitioner could be prosecuted for contempt,

the only issue here is whether the same grand jury which heard his testimony could thereafter return a true bill of indictment for contempt.

A New York grand jury may indict a person only when

> "(a) the evidence before it is legally sufficient to establish that such person committed such offense and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense." N.Y.C.P.L. §190.65.

Any grand jury that would consider whether an accused committed criminal contempt would have to determine that there was probable cause to believe that he refused to answer a "legal and proper interrogatory" and did so refuse with the requisite criminal intent, that is "contumaciously and unlawfully." N.Y. Penal Law §215.51.

[7] Langella appeared before the grand jury and answered responsively to a meager number of questions. Under these circumstances, any grand jury that would consider indictment might need to examine the transcript of his appearance in its entirety to determine whether the questions were proper, and whether the witness acted with the requisite specific criminal intent. Since any grand jury could consider the transcript in its entirety, and receive parol evidence of the witness' demeanor in the grand jury room, there is no reason why the grand jury before whom Langella testified under grant of immunity could not thereafter indict him for contempt, based in part on the jurors' own observation of his demeanor while refusing.

[8] Petitioner contends that certain testimony which he gave must have prejudiced the grand jury. Langella testified that he was a professional gambler (A-53), that he had not filed income tax returns for a number of years (A-52),[5] and that he was a close friend of Alphonse Persico (A-

5. Petitioner volunteered this information in an unresponsive answer to the question of what his occupation was.

100), a person alleged to have been involved in the subject murder investigation. There was sufficient evidence upon which the grand jury could indict for contempt, and there is no reasonable basis for inferring bias or prejudice on the part of the grand jurors. See *United States v. Polizzi*, 500 F.2d 856, 887-88 (9th Cir. 1974), *cert. denied* 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975), quoting *Silverthorne v. United States*, 400 F.2d 627, 634 (9th Cir. 1968), *cert. denied* 400 U.S. 1022, 91 S.Ct. 585, 27 L.Ed.2d 633 (1971):

> "The quantum of evidence necessary to indict is not as great as that necessary to convict. If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence."

The safeguard against the prejudice claimed here would have been a trial on the merits. Petitioner admitted having committed the offense and thereby waived any objection that the indictment was founded on insufficient evidence and was a result of the bias or prejudice of the grand jurors.

Goldberg v. United States, 472 F.2d 513 (2d Cir. 1973) and *United States v. Dornau*, 359 F.Supp. 684 (S.D.N.Y. 1973), *rev'd* 491 F.2d 473 (2d Cir. 1974), relied upon by petitioner, are inapposite. In each of those cases, the Court was concerned with whether a defendant could be indicted by a grand jury, after it heard his testimony under a grant of use immunity, for transactions concerning which he had testified. Under those circumstances, to insure against direct and derivative use of the testimony, in accordance with the immunity conferred, it may be necessary to present the evidence to another grand jury. Here, the immunity conferred specifically excluded the crime of contempt.

Petitioner's final contention is that he was deprived of his

Sixth Amendment right to counsel because he was not permitted to consult with his attorney when questions arose concerning the scope of his immunity. Petitioner contends that the limited right of a grand jury witness to consult with his counsel is grounded in the Sixth Amendment. There is reason to doubt that the term "criminal prosecution" used in the Sixth Amendment encompasses a grand jury investigation. See *Counselman v. Hitchcock*, 142 U.S. 547, 563, 12 S.Ct. 195, 35 L.Ed. 1110 (1892). For purposes of this argument, however, we assume that the rights conferred upon a state grand jury witness by *People v. Ianniello*, 41 N.Y.2d 418, 288 N.Y.S.2d 462, 235 N.E.2d 439 (1968), are rights secured by the United States Constitution.

Langella conferred with his attorney prior to entering the grand jury room. After being advised that the grand jury was investigating the Gallo murder and that he was testifying under a grant of immunity except for the crimes of perjury and contempt, he was asked if he had any questions about his appearance before the grand jury and answered that he had none (A-41). Langella stated his name and address but when he was asked his occupation, he made his first request to confer with counsel and was excused from the room to permit him to discuss the question with his attorney.

[9] In the approximately one hour and forty minutes that he was in the grand jury room, Langella was excused to confer with his attorney on four separate occasions for a total of approximately forty minutes. During the time that he was present before the grand jury, petitioner refused to answer the questions put to him and succeeded in his effort to engage in a fencing match with the Assistant District Attorney over his right to consult with counsel. At no point did the prosecutor deny petitioner's requests and petitioner did not answer any question without having the opportunity to confer with counsel. In sum, petitioner was not deprived of his right to confer with counsel during his appearance before the grand jury.

The petition for a writ of habeas corpus is in all respects denied.

Although we find his claims wanting in merit, they concern sensitive constitutional issues and present fair ground for litigation. Accordingly, pursuant to 28 U.S.C. §2253 and Rule 22(b), F.R.App.P., petitioner is hereby granted a certificate that probable cause exists to maintain an appeal.

In view of the relatively short term of incarceration to which petitioner has been sentenced, and the possibility that he might be required to serve this sentence before the substantial issues raised upon this petition could be reviewed on appeal, petitioner's surrender will be stayed pending appeal, and he will remain enlarged on his existing bail unless the Court of Appeals shall direct otherwise. *Argro v. United States*, 505 F.2d 1374, 1377-78 (2d Cir. 1974). The stay shall be conditioned upon a continued compliance with all existing bail arrangements applicable to petitioner.

So Ordered.

APPENDIX C
MINUTES OF PROCEEDINGS BEFORE THE THIRD AUGUST 1972 GRAND JURY DECEMBER 19, 1972 TESTIMONY OF JERRY LANGELLA

JERRY LANGELLA, called as a witness, having been first duly sworn, testified as follows:

BY MR. TANENBAUM:

Q Mr. Langella, I wish to inform you that this grand jury is investigating the death of Joseph Gallo. And they are investigation—that is this grand jury is investigating the crimes of murder and conspiracy to commit murder as well as other related crimes. Do you understand that?

A Yes, I do.

Q I further instruct you that every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part it may tend to incriminate him. A witness who gives evidence in a grand jury proceeding receives immunity unless he has waived it and nobody has asked you to waive immunity, or such evidence is not responsive to any inquiry and is gratuitiously given or volunteered by the witness with knowledge that it is not responsive. Do you understand?

A Yes, I think I do.

Q I mentioned the word "immunity" and I tell you that if you give evidence in this proceeding you have what is called transactual immunity. And I will explain that to you right now.

A I wish you would.

Q You are a witness in this legal proceeding and you cannot be convicted of any offense or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which you give evidence in this legal proceeding. You possess immunity from any such conviction, penalty or forfeiture. However even though you

possess such immunity you may nevertheless be convicted of perjury as a result of having given false testimony in this legal proceeding and you may be convicted of or adjudged in contempt as a result of having contumatiously refused to give evidence. I further tell you that this grand jury proceeding is a legal proceeding and to give evidence here means to testify or to produce physical evidence. Do you understand that, sir?

A Mr. Tanenbaum, may I ask you a question? I understand what you said. In other words, if I was to lie here I would not get punished for perjury?

Q That is not correct. The immunity does not cover, Mr. Langella—the immunity granted to you, the transactual immunity granted to you, does not cover any possible perjury or contempt. Do you understand that now?

A I think I do.

Q I further will tell you the law of criminal contempt in the first degree. A person is guilty of criminal contempt in the first degree when he contumatiously and unlawfully refuses to be sworn as a witness before a grand jury or when after having been sworn as a witness before a grand jury he refuses to answer any legal and proper interrogatory. Do you understand that, Mr. Langella?

A I imagine I do.

Q Do you have any questions concerning these legal matters between you and this grand jury?

A No, I guess not.

Q Have you conferred with your lawyer Mr. Gellina?

A Yes, I did.

Q Now, you were just up in Part 30, is that correct, in the Supreme Court, New York County?

A Yes.

Q And Justice Sanderford (phonetic) there directed you to answer questions before this grand jury, is that correct?

A If that is the judge's name, that is correct.

Q That was done in the presence of your attorney Mr. Gallina, is that correct, Mr. Langella?

A Yes, Mr. Tanenbaum.

Q Can we have your full name and address, please?

A Jerry Langelia, 1617 Cropsey Avenue.

Q And your occupation, please?

A I have to ask my lawyer that.

Q Do you understand all the legal matters concerning you before this grand jury, Mr. Langella?

A I have to ask my lawyer.

Q Do you understand the legal matters concerning you before the grand jury? Do you understand the question I just asked you?

A I said I would have to ask my lawyer that.

Q Oh, do you understand the question I just asked you, namely do you understand the legal matters concerning you before this grand jury?

A I did answer the question. I would have to ask my lawyer.

Q Well, Mr. Langella, I'm asking you a very simple question. Do you, Mr. Langella, understand the legal matters concerning you before this grand jury?

A Mr. Tanenbau, you are confusing me. Now I forgot the question.

Q I'll repeat it. If at any time you forget the question or don't understand anything please indicate that. The question is do you understand the legal matters concerning you before this grand jury?

A Not really. You confuse me.

Q Would you like to discuss that with your lawyer?

A I don't know what even to discuss with him right now.

Q You indicated you wanted to discuss it with your lawyer?

A You asked me a question a few minutes ago.

Q Do you intend to discuss with your lawyer after every question is asked of you?

A I have to ask my lawyer.

Q Do you understand your lawyer is not allowed to be in the grand jury?

A I have to ask him.

Q Go out and consult with your lawyer.

A As to what?

Q Everything you said in the grand jury.

A I imagine so.

Q Is that correct or not, Mr. Langella?

A It's correct.

Q Please go out and confer with your lawyer.

(Witness is excused from the grand jury chamber at this point.)

MR. TANENBAUM: It is now eight minutes after three. (The witness reenters the grand jury chamber.)

MR. TANENBAUM: The record should reflect that the witness left at 3:08 and it is now 3:15.

Q Have you conferred with your attorney, Mr. Langella?

A Yes, I did, Mr. Tanenbaum.

Q Now, do you understand the legal proceedings concerning you before this grand jury?

A Do I have immunity here, Mr. Tanenbaum?

Q Do you understand the legal matters concerning you before this grand jury?

A Do I have immunity?

Q Do you understand the question, Mr. Langella?

A Do I have immunity here?

Q Do you understand the question I asked you?

A Do I have immunity?

Q It has already been explained you possess what is known as transactual immunity. Do you understand that?

A I'm asking a question. Do I have immunity?

Q Do you understand the question that is put to you, Mr. Langella? Do you understand the legal matters concerning you before this grand jury?

A I'm asking you a question. Do I have immunity?

Q It has already been explained to you, Mr. Langella, you possess transactual immunity. Do you understand that? Do you understand that, Mr. Langella?

A Not really.

Q Did you discuss it with your lawyer?

A He wants to know if I would be prosecuted here or any other state if I was to testify?

Q Well, Mr. Langella, you have a a card that you just read from, is that correct?

A Yes.

Q Was that given to you by the lawyer?

A Yes.

Q Now, you just talked to your lawyer, is that correct?

A Yes, I did.

Q And you spoke with your lawyer prior to being called into this grand jury room today, isn't that correct?

A Yes. I did.

Q And you discussed the matters that concern you before this grand jury with those lawyers, didn't you?

A Yes.

Q Now, you have been informed that you possess what is

called transactual immunity which I explained to you.

A I have immunity in other words, Mr. Tanenbaum?

Q That is correct. That immunity, as I explained to you, does not cover any perjury that you may commit before this grand jury. And it does not cover any possible contempt that you may commit before this grand jury.

A Does it consist of—

Q Do you understand that?

A —statements—

Q Do you understand that?

A Excuse me?

Q Do you understand that?

A What was the question again?

Q The question is that you possess transactual immunity as I explained it to you. However that does not cover any possible perjury which you may commit and or contempt that you may commit. Do you understand?

A Yes.

Q Now, you are here to answer questions, Mr. Langella. If it were otherwise other people will be answering question. I informed you that your lawyer is not permitted by law in New York State to be in this grand jury room. Now the question that was put to you was would you please tell this grand jury what, if any, your occupation is?

A I have to ask my lawyer that. I didn't know what the question was.

Q That is what you went out to ask your lawyer, Mr. Langella, what is your occupation.

A I didn't ask him.

Q That you can choose to answer the question or not answer the question.

A I didn't ask him that.

Q You went out to talk to your lawyer, Mr. Langella, and it was clear what the question was. You spoke to him approximately ten minutes. It is a very simple question. What is your occupation?

A Mr. Tanenbaum, you clocked me for me there with him five minutes and I told you before I left the room I did not know what I wanted to talk to my attorney about.

Q You indicated that you wanted to talk to your lawyer about what your occupation was.

A I was confused.

Q What are you confused about?

A I am not as bright as you.

Q You are a very intelligent man. Tell the grand jury what is confusing to you?

A I don't know what to talk to him.

Q You want to speak to him and you didn't know what to sspeak to him?

A He was confusing me.

Q Your lawyer?

A I said I don't know why he told me to come out. I don't know what the question was.

Q That is what you spoke to your lawyer about, is that correct?

A (No response.)

Q Is that correct?

A Yes.

Q Didn't you request to speak to your lawyer after the question was put to you what is your occupation?

A Yes, I also asked you what was the question.

Q The questions is obviously, Mr. Langella, which you know now, what is your occupation? That is the question.

A Let me talk to my lawyer, please.

Q The question is what is your occupation?

A I would like to confer with my lawyer.

Q What don't you understand?

A I want to talk to him.

Q You can only confer with the lawyer if you don't understand the relevance of the question to the investigation and or whether or not you don't understand the legal matters concerning you before this grand jury. Now you have indicated that you understand the matters concerning you before this grand jury, isn't that correct?

A I still want to talk to my lawyer about whether I should answer that question or not.

Q You can choose to answer it or not answer it, Mr. Langella. The question is what is your occupation?

A I would like to talk to my lawyer about that.

Q Mr. Langella, did you ever visit 101 Godney Street in Nyack, New York?

A I would like to talk to my lawyer about the first question, please. One question at a time.

Q Is that what you intend to do, to talk to your lawyer after every question is asked?

A I would like to talk to my lawyer about the first question.

Q Is that what you intend to do before this grand jury?

A Please let me talk to him about the first one.

Q Do you understand the question asked of you, Mr. Langella?

A I'm still thinking about the first one.

Q What is the answer to the first one? What is your occupation?

A I have to talk to my lawyer.

Q Did you plan to murder Joseph Gallo on April 7, 1972?

A I still have to talk to him about the first one.

Q The question put to you now, Mr. Langella, is did you plan to kill Joseph Gallo on April 7, 1972?

A I still have to talk to him about the first question, Mr. Tanenbaum.

Q The question, Mr.—

THE FOREMAN: You are instructed by the grand jury, Mr. Langella, to please answer the question.

THE WITNESS: The first question?

THE FOREMAN: The first question.

THE WITNESS: Let me talk to my lawyer.

Q Mr. Langella, so it is clear, you will talk to your lawyer about the legal matters concerning you. And please come back with full knowledge of that. I am informing you after every question if you intend to talk to your lawyer you will be in error with this grand jury.

A Let me talk to him. One question at a time.

MR. TANENBAUM: The record should reflect it is now twenty-one minutes after three.

(Witness leaves the grand jury room and returns a short time thereafter.)

MR. TANENBAUM: The record should reflect it is approximately 3:30—

A Mr. Tanenbaum—

MR. TANENBAUM: —that the witness has reappeared.

Q Now, Mr. Langella, have you spoken with your lawyer?

A Can my attorney come in here to help me answer—understand the questions?

THE FOREMAN: I'm afraid your lawyer cannot come into the room and the grand jury instructs you to answer all

questions, Mr. Langella.

Q Now, you have conferred with your lawyer, is that correct, Mr. Langella?

A Yes, but does that also mean I have also be given protection against federal and other prosecutors as to the matters of which I am testifying?

Q Did you confer with your lawyer about the issues that you asked us to confer with him about?

A I'm asking you a question.

Q Did you understand the question? Do you understand the question that was posed to you?

A I was told to ask you does that immunity also give me the protection from federal and other state prosecutors into the matters of which I am testifying?

Q Did you understand the question that was put to you?

A (No response).

Q What is your occupation, Mr. Langella?

A I have not filed income tax returns for a number of years.

MR. TANENBAUM: The record should reflect that Mr. Langella is reading from a yellow piece of paper, is that correct, Mr. Langella?

A (No response)

Q Is that correct, Mr. Langella?

A (No response)

MR. TANENBAUM: Mr. Foreman, is that correct that Mr. Langella was just reading from a yellow piece of paper?

THE FOREMAN: That is correct.

Q What is your occupation, Mr. Langella?

A I have to confer with my lawyer.

Q Mr. Langella—

A Again—

Q The question to you is—

A A gambler.

Q That is your occupation?

A Yes.

Q You have no job, is that correct?

A A gambler.

Q You don't go to work anywhere is that correct?

A A gambler.

Q Did you plan to kill Joseph Gallo on April 7, 1972?

A Does that immunity give me the protection from federal and other prosecutors also in the matters of which I am testifying?

Q Did you hear the question?

A (No response)

Q Did you hear the question, Mr. Langella?

A I have to ask my lawyer.

THE FOREMAN: The grand jury directs you to answer Mr. Tanenbaum's question, Mr. Langella.

THE WITNESS: I would like to speak to my lawyer.

Q The question is did you plan to kill Joseph Gallo on April 7, 1972? What is the answer, please?

A I would like to speak to my lawyer.

Q Is that the answer to the question?

A I would like to speak to my lawyer.

Q What is it that you would like to talk to your lawyer about?

A Because I ain't as smart as you.

Q What don't you understand?

A Does that immunity give me protection against federal

and other prosecutors in the matters which I am testifying?

Q The scope of the immunity has been explained to you and you said you understood what it means. The question before you is did you plan to kill Joseph Gallo on April 7, 1972?

A I said I didn't understand the immunity fully. I also told you I would like to have my lawyer in here to help me understand the questions of immunity—

Q You discussed immunity with your lawyer, didn't you?

A I can't explain it to him in legal—

Q Did you talk to your lawyer about the extent of your immunity before this grand jury?

A Mr. Tanenbaum, you can see how smart I am. He has to give me a card to come in here.

Q You are not deceiving the grand jury. The games you play here are amply noted by the grand jurors. The question is did you speak to your lawyer as to the scope of your immunity as you indicated you did when you first went out to talk to your lawyer?

A Yes.

Q The question is do you understand the legal matters concerning you before this grand jury?

A Not really.

Q What don't you understand?

A All the legalities here.

Q Did you talk to your lawyer about it?

A I would like to have his presence.

Q Did you talk to your lawyer about it?

A I don't know how to explain it.

Q Did you talk to your lawyer about the legal matters before this grand jury?

A What I told him he don't understand because I didn't explain it to him.

Q Did he explain to you the legal matters concerning you before this grand jury?

A Yes.

Q Did you discuss it with him?

A Yes.

Q The question is did you plan to kill Joseph Gallo on April 7, 1972?

A I would like to speak to my lawyer about that.

Q Concerning what?

A The question.

Q What is it that you don't understand?

A The question you asked me.

Q You cannot go out and speak to your lawyer after every question asked of you.

A Why not?

Q That is the law.

A That is my right.

Q The question is, you can choose to answer it or not answer it. I wish to inform you in the interest of fairness you are a witness hece. If you choose not to answer that question you can subject yourself to contempt before the grand jury. That is up to the grand jury. The question is did you plan to kill Joseph Gallo on April 7, 1972?

A I would like to talk to my lawyer.

THE FOREMAN: You are directed by the grand jury, Mr. Langella, to answer the District Attorney's question.

THE WITNESS: When I speak to my lawyer.

Q You are refusing to answer the question?

A I said I want to talk to my lawyer.

Q About what?

A About the question that you asked me.

Q What about it?

A I want to talk to him.

THE FOREMAN: We ask you again to answer the District Attorney's question.

THE WITNESS: After I speak to my lawyer.

THE FOREMAN: You do not understand the question, Mr. Langella?

THE WITNESS: After I speak to my lawyer.

Q Is there anything you don't understand, Mr. Langella?

A I don't understand what you are doing to me. You are hollering and screaming at me.

THE FOREMAN: I would like to contradict you. I don't think Mr. Tanenbaum has been hollering and screaming. He has been asking you in a level tone to answer a specific question. The grand jury instructs you to answer that question.

THE WITNESS: Mr. Foreman, I don't have the knowledge he has. I'm only a sixth grade dropout. He's a college man. He's giving me questions I cannot answer with the legalities of these big words. These are five letter words.

THE FOREMAN: I now ask the District Attorney to ask the question again in as simple terms as possible.

Q The question is simply did you plan to kill Joseph Gallo on April 7, 1972?

A I would have to ask my lawyer that.

THE FOREMAN: We direct you to answer that question.

THE WITNESS: I will after I speak to my lawyer.

THE FOREMAN: You realize what contempt means?

THE WITNESS: Not really. I would still like to talk to my lawyer.

Q Did your lawyer tell you to come in here and tell the grand jurors for the record that I was yelling at you?

A I'll answer one question at a time.

Q Did you understand the question I just asked you?

A If I killed Joseph Gallo?

Q Did you understand that question?

A I would like to talk to my lawyer.

Q Did you understand the question?

A One question at a time.

Q And you plan to go out and talk to your lawyer, is that correct?

A One question.

Q You have been directed to answer the question. Did you plan to kill Joseph Gallo on April 7, 1972? What is the answer to the question, please?

A I would like to talk to my lawyer.

Q The next question is did your lawyer tell you to come in here and put on the record that anybody in this grand jury was yelling at you?

A No.

Q You just volunteered that yourself, is that correct?

A You are hollering at me.

THE FOREMAN: Does any one of these members of the grand jury feel that the District Attorney has been hollering at the witness?

THE WITNESS: He's scaring me anyway.

THE FOREMAN: There is a difference between hollering and scaring.

THE WITNESS: Scaring.

THE FOREMAN: You don't mean hollering?

THE WITNESS: Scaring.

THE FOREMAN: He is scaring you by his questions?

THE WITNESS: Yes.

THE FOREMAN: You don't feel as though he is hollering at you though?

THE WITNESS: Mr. Foreman, he's telling me immunity. I really—I'm saying yes but I honestly don't know what immunity is, congressional immunity, these are words I never heard in my life. I mean I would love to have my attorney in here and I'll be willing to answer all of the questions.

THE FOREMAN: Your attorney is not permitted in this room.

THE WITNESS: Why ain't I permitted—

THE FOREMAN: Not only for you but for any other witness.

THE WITNESS: But I am not—you know, you're a smart man, why ain't I allowed to go out and ask my question?

THE FOREMAN: You left the room I think twice now to ask questions of your attorney as the District Attorney indicated. If the question is of a legal nature and you do not understand the legality of the question you are entitled to speak to your attorney.

THE WITNESS: Right.

THE FOREMAN: But if he asks you your name or where you were yesterday and what your occupation is there is nothing legal about that. That requires a simple question and a simple answer.

THE WITNESS: Ain't allowed to go out after each question?

THE FOREMAN: No.

THE WITNESS: I'm not?

THE FOREMAN: No.

THE WITNESS: Are you sure, Mr. Foreman? Mr. Tanenbaum, is he correct?

THE FOREMAN: Unless there—

Q The question put to you—

A Mr. Tanenbau, is he right?

Q When you become an assistant district attorney and appear in a grand jury you will ask the question. Now you are a witness and the question put to you is did you plan to kill Joseph Gallo on April 7, 1972?

A The answer is I would like to talk to my attorney.

Q The next question is did you visit 101 Godney Street, apartment LK in Nyack, New York during the month of April, 1972?

A I would like to talk to my attorney.

THE FOREMAN: We direct you to answer that last question, please.

THE WITNESS: How many questions can I answer at once?

THE FOREMAN: If you answer one question at a time.

THE WITNESS: I want to see my attorney after each question.

THE FOREMAN: You do not understand the question, is that the reason?

THE WITNESS: I do not understand the question.

Q What is it that you don't understand?

A Yes, I have to answer a question without consulting my attorney.

Q That's what you don't understand?

A Yes.

Q So there is nothing in here in the question that you don't understand, is that correct?

A I want to speak to my attorney.

Q It is a very simple question, Mr. Langella, isn't it? Did you plan to kill Joseph Gallo on April 7, 1972?

A I want to speak to my attorney.

Q Are there any words in that sentence you don't understand?

A Yes, you won't let me speak to my attorney.

Q That is the only part you don't understand?

A I want to speak to my attorney.

Q I will go through it word by word that you don't understand it. We'll go through it. Did you plan to kill Joseph Gallo on April 7, 1972?

A I want to talk to my attorney.

Q Is there anything about that that you do not understand?

A I would like to talk to my attorney. Why won't you let me talk to my attorney?

Q Is there anything about that question that you don't understand, Mr. Langella?

A Mr. Tanenbaum, can I speak please to my attorney?

Q Is there anything you don't understand, Mr. Langella?

A When I speak to my attorney I'll answer any question you want me to.

Q Mr. Langella, you just spoke to your attorney twice. Now what is the answer to the question, please?

A I still want to speak to my attorney.

Q I wish to inform you again in the interest of fairness if you persist in not answering these questions you subject yourself to possible contempt before this grand jury and

contempt is a felony, it's a crime for which you can be prosecuted. Do you understand?

A I would like to talk to my attorney.

Q What is it that you don't understand that causes you to want to talk to your attorney?

A I don't understand why you won't let me talk to my attorney.

Q Is there anything you don't understand, Mr. Langella? You are looking at your watch, Mr. Langella?

A I would still like to talk to my attorney.

Q Is there anything, Mr. Langella, that you don't understand?

A Why you won't let me talk to my attorney.

Q Is that the only thing you don't understand?

A I would like to talk to him.

Q Is that all you don't understand is why you cannot talk to your lawyer?

A (No response)

Q Is that correct, Mr. Langella?

A I want to talk to my attorney.

Q Is there anything you don't understand that causes you to want to talk to your lawyer?

A Why can't I talk to my attorney?

Q Do you understand the question, Mr. Langella?

A Do you understand me?

Q Is there anything you don't understand that causes you to want to talk to your lawyer?

A I can't understand why you won't let me talk to him.

Q Is that all?

A I would like to talk to him. That's it.

Q Is that all?

A (No response)

Q Did you visit 101 Godney Street in Nyack, New York?

A I want to —

Q During the month of April, 1972?

A I want to talk to my attorney.

Q Did you plan to murder Joseph Gallo with Joseph Yacoveli?

A I want to talk to my attorney.

Q Is there anything you don't understand about the question?

A I want to talk to my attorney.

Q Is there anything you don't understand about the question?

A I want to talk to my attorney.

THE FOREMAN: Mr. Langella, you are directed by the grand jury to please answer the question.

THE WITNESS: When I talk to my attorney. When and if I am allowed to talk to my attorney I will answer the question.

Q Mr. Langella, have you communicated with Carmine DiBiase since April 7, 1972?

Q When I talk to my lawyer I will answer the question.

THE FOREMAN: Will you answer the question, please?

THE WITNESS: When I talk to the lawyer I will answer the question.

Q Is there anything about the question that you don't understand?

A When I talk to the lawyer I will answer the question.

Q Is there anything you don't understand about the question, Mr. Langella? Is there anything you don't understand about the question?

A When I talk to my attorney I will answer all questions put to me.

Q . Well, you already indicated that, havenat you, Mr. Langella? You spoke to your attorney twice, haven't you?

A I can go out that door as many questions as you ask me, Mr. Tanenbaum.

Q Have you already spoken to your attorney twice?

A I didn't count. Did you?

Q Do you recall speaking to your lawyer twice?

A I recall speaking to him.

Q Was it once or twice?

A Twice I imagine.

Q You indicated on both of these occasions prior to talking to him if you spoke to him you would answer all of our questions, didn't you?

A I—

Q Is that correct?

A I would like to talk to him.

Q Can't you answer that question?

A I would like—

A I would like—

Q You can handle that question?

A I would like to talk to my attorney.

Q Isn't that what you said before?

A I would like to talk to him. Take one question at a time.

Q Is that the way you want this grand jury to proceed, one question at a time?

A How ever you would like it.

Q It is quite clear this grand jury would like you to answer these questions.

A I would love to answer them.

Q Please answer them.

A One at a time.

Q Now—

THE FOREMAN: Let's start with the first one then, Mr. Tanenbaum.

Q Did you plan to kill Joseph Gallo on April 7, 1972?

A I would like to talk to my attorney about that.

Q What is it that you don't understand about that question that causes you to want to talk to your attorney?

A I don't understand why you won't allow me to leave the room.

Q What is it about that question that causes you to want to talk to your lawyer?

A I don't understand why you won't let me leave the room.

Q Is that your answer to my question?

A I didn't say that.

Q You didn't say what?

A Are you making up my mind?

Q Is that your answer to the question?

A I would like to talk to my attorney.

Q Is that your answer to the question?

A That I want to talk to my attorney, yes.

Q That is your answer to these questions?

A I said I want to talk to my attorney.

Q Is that your answer to the question?

A Don't make up my mind.

Q Is that your answer to the question?

A I want to—

Q Is that your answer to the question?

A I want to talk to my attorney.

Q That is your answer to the question, is that correct?

A I said I want to talk to my attorney. That's all I said.

Q Now, that was the first question that was put to you. Again, did you plan to kill Joseph Gallo on April 7, 1972?

A Isn't that the first question?

Q What is the answer, please?

A I would like to talk to my attorney.

Q The next question is did you visit 101 Godney Street, apartment LK in Nyack, New York during the month of Apri, 1972?

A I would like to talk to my attorney.

Q You have been looking at your watch, is that correct, Mr. Langella?

A (No response)

Q Did you hear me?

A I heard you.

Q What is the answer to the question?

A Yes.

Q Do you have some place to go?

AI got a date with a girl.

Q You have a date with a girl?

A Yes.

Q You feel by not answering these questions that this grand jury will go home and they won't ask you any more questions?

A Definitely not.

Q Now, the first question that was put to you is a simple question. Did you plan to kill Joseph Gallo on April 7, 1972? What is the answer?

A I would like to speak to my attorney.

Q Did you speak—have you spoken with Carmine DiBiase since April 7, 1972?

A I would like to speak to my attorney.

Q Do you know where Joseph Yacoveli is presently?

A I would like to speak to my attorney.

THE FOREMAN: You are directed by the grand jury, Mr. Langella, to answer the District Attorney's question.

THE WITNESS: I would like to speak to my attorney, please.

Q Did you plan to murder Joseph Gallo with Joseph Yacoveli?

A I would like to speak to my attorney.

Q Have you been the bodyguard for Alphonse Persico?

A I would still like to speak to my attorney.

Have you met and conferred with Joseph Luperoli prior to April 7, 1972?

A I would like to speak to my attorney.

Q Have you been receiving messages from Joseph Yacoveli through Joseph Gorgone concerning the murder of Joseph Gallo on April 7, 1972?

A I would like to speak to my attorney.

THE FOREMAN: Would you answer these questions, please.

THE WITNESS: I would like to speak to my attorney, please.

Q Is there anything about these questions that you do not understand?

A I would like to speak to my attorney.

Q Have you spoken or communicated with Joseph Yacoveli since April 7, 1972?

A I would like to speak to my attorney.

BY MR. TANANBAUM:

Q Were you present during conversations had between Alphonse Persico and Joseph Yacovelli concerning the murder of Joseph Gallo?

A I would like to speak to my attorney.

MR. TANENBAUM: Mr. Foreman?

FOREMAN: You are instructed by the grand jury, Mr. Langella, to answer the district attorney's question.

THE WITNESS: Mr. Foreman, does anybody instruct me to go out and talk to my lawyer? I will answer the questions if I am allowed to speak to my attorney.

FOREMAN: If you go out will you answer all his questions?

THE WITNESS: One at a time.

Q Very well, go out and speak with your attorney.

A About what now?

MR. TANENBAUM: Let the record reflect that Mr. Langella is laughing and smiling.

Q Mr. Langella, have you requested to talk to your lawyer?

A Yes, I do.

Q And now you don't know what you want to talk to your lawyer about?

A You have asked me so many questions, I forgot.

FOREMAN: You are directed to answer Mr. Tanenbaum's questions. This grand jury instructs you to answer his questions.

THE WITNESS: So far as what, Mr. Foreman?

FOREMAN: Any of the questions that you might remember that Mr. Tanenbaum has asked.

(Witness leaves grand jury room at 3:44 p.m. and returns at 3:59 p.m.)

MR. TANENBAUM: The record should reflect that the witness left at approximately ten minutes to four and it is now approximately five minutes after four.

Q Have you spoke with your lawyer, Mr. Langella?

A Yes, I did.

Q Are you now prepared to answer the questions that were put to you?

A Yes.

Q Did you plan to kill Joseph Gallo on April 7, 1972?

A No, I did not.

Q Did you, since April 7, 1972, have you spoken with Carmine DiBiase?

A No, I did not.

Q Have you conferred with Joseph Yacovelli after April 7, 1972?

A No, I did not.

Q Did you visit 101 Godney Street in Nyack, New York during the month of April, 1972?

A Because of my concern about this criminal procedure and any other prosecution, I may assure—if I answer the questions here would I be, you know—he gave me the wrong card the lawyer.

Q The question is: Did you visit 101 Godney Street in Nyack, New York during the month of April, 1972? What is the answer, please?

A I refuse to answer.

FOREMAN: The grand jury instructs you to answer the question.

THE WITNESS: I refuse to answer.

Q Mr. Langella, isn't it a fact that you visited 101

Godney Street in Nyack, New York, apartment LK, with Alphonse Persico, also known as Allie Boy Persico, and there discussed the murder of Joseph Gallo?

A I refuse to answer.

FOREMAN: You are directed by this grand jury, Mr. Langella, to answer the question.

THE WITNESS: I refuse to answer.

Q Mr. Langella, isn't it a fact that inside that apartment, after the murder of Joseph Gallo, you discussed with Mr. Yacovelli and with Mr. Alphonse Persico, also known as Allie Boy Persico, the murder of Joseph Gallo?

A I refuse to answer.

FOREMAN: You are instructed by the grand jury, Mr. Langella, to answer the district attorney's question.

THE WITNESS: I refuse to answer.

Q Isn't it a fact that inside that apartment, apartment LK, at 101 Godney Street in Nyack, New York, after April 7, 1972, you also spoke with Joseph Luparelli?

A I refuse to answer.

FOREMAN: You are instructed by this grand jury to answer the question, Mr. Langella.

THE WITNESS: I refuse to answer.

Q Isn't it a fact that you have been and were during the month of April, 1972, the bodyguard for Alphonse Persico?

A I have to talk to my lawyer about that.

Q Is there anything you don't understand about that?

A I would like to talk to my lawyer about the first question.

Q Mr. Langella, isn't it a fact that inside of apartment LK at 101 Gedney Street in Nyack, New York, after the murfer of Joseph Gallo, which took place on April 7, 1972, you were acting as a bodyguard for Mr. Alphonse Persico?

A I refuse to answer.

FOREMAN: This grand jury instructs you to answer the question, Mr. Langella.

THE WITNESS: I want to talk to my lawyer.

Why can't I talk to my lawyer, please?

Q Is there anything about that question that you don't understand why you won't allow me to talk to my attorney.

Q What is it that you don't understand, Mr. Langella?

A Why you won't let me talk to my lawyer.

Q About what?

A About these questions.

Q Which ones?

A If I have ever been up at Nyack.

Q What is it you don't understand?

A I told you, I refuse to answer.

Q Is there anything you don't understand about that question?

A It's I would like to talk to my attorney.

Q About what?

A About why you won't let me talk to him.

Q Is there anything you don't understand about the question?

A Just the same answer.

Q What is that, sir?

A Why you won't let me talk to him.

Q After April 7, 1972, Mr. Langella, didn't you discuss with Alphonse Persico, inside apartment LK at 101 Godney Street in Nyack, New York, the murder of Joseph Gallo?

A I would like to talk to my lawyer.

FOREMAN: You are directed, Mr. Langella, by this

grand jury to answer the question.

THE WITNESS: I would like to talk to my lawyer.

Q What is it you don't understand, please?

A Why you won't let me talk to my lawyer.

Q Is there anything in the question that you do not understand?

A I don't understand why you will not allow me to speak to my attorney.

Q Is there anything, Mr. Langella, in the last question Et was asked of you that you do not understand?

A Why you won't allow me to talk to my attorney.

Q Is that your answer to the question?

A Why won't you allow me to talk to my attorney.

Q Is that your answer to the question, please?

A I even forgot the question, Mr. Tanenbaum.

Q Is there anything you don't understand about the question, Mr. Langella?

A Why won't you allow me to talk to my lawyer?

Q Is that your answer?

A To what?

Q Is there anything you don't understand about the question?

A I don't even know what the question is, to tell you the truth.

MR. TANENBAUM: Will the stenographer read back the question?

(Question read back as follows:

"Question: After April 7, 1972, Mr. Langella, didn't you discuss with Alphonse Persico, inside apartment LK at 101 Gedney Street in Nyack, New York, the murder of Joseph Gallo?")

A No, I did not.

Q You did not discuss the murder of Joseph Gallo with Mr. Persico, is that what you are saying?

A Yes.

Q Were you with Mr. Persico after April 7, 1972?

A I would like to speak to my attorney.

Q Is there anything you don't understand about that question?

A Why won't you let me talk to my attorney?

Q Is there anything you don't understand about the question, Mr. Langella?

A I don't know why you won't let me talk to my lawyer, that I don't understand.

Q Is that what you don't understand?

A Yes, I don't understand why you won't let me talk to my attorney.

Q Is there anything in the question that you do not understand?

A Why can't I talk to my lawyer after each question? I don't understand that.

Q Is that what you don't understand?

A No, I don't understand.

Q Do you understand the question?

A What is the question?

Q Do you understand the questions that have been asked of you?

A Not really. I mean, you are talking all this law. I am not too much of a bright fellow.

Q You haven't understood the questions, is that what you are saying?

A What question?

Q Any question that has been asked of you have you understood?

A I don't understand this congressional immunity, not too well.

Q That is what you don't understand?

A Not really.

Q Did you discuss that with your lawyer?

A I don't know how to tell him what you are telling me.

Q Do you have this card in your hand concerning this congressional immunity?

A He is just as nervous as I am; he gave me the wrong card.

Q He gave you the wrong card?

A Yes.

Q Didn't he talk to you about what was on whatever cards he gave you?

A (No response)

Q What is the answer to that, please?

A To what?

Q Didn't you just hear what I said?

A Not really.

Q Aren't you paying attention, Mr. Langella?

A I'm nervous.

Q Aren't you paying attention to the questions being asked of you?

A I am very nervous, that I know.

Q Did your lawyer taok to you about what was on those cards that were given to you?

A Naturally.

Q What was on those cards concerned this immunity, didn't it?

A I imagine so.

Q He spoke to you about that, didn't he?

A I better go out and talk to him again.

Q He spoke to you about that, didn't he?

A I would like to talk to him now. This way I got a clear head.

Q You spoke to him before you came into this grand jury about these matters, haven't you?

A I would like to talk to him now.

Q Did you understand the question I just asked you?

A Can I go out and talk to him?

Q Did you understand the question I just asked you?

A Can I go out and talk to him?

Q Did you understand the question I just asked you? Didn't you talk to your lawyer about these matters before you came into this grand jury room?

A I don't even know what I'm here for, to tell you the truth.

Q You know you are a witness in this grand jury procedure?

A All I know is I got a subpoena, that's all I know.

Q You know that on that subpoena this is a grand jury investigation into the death of Joseph Gallo; you know that, don't you?

A Truthfully I had no subpoena here. I was just told by an attorney to be here.

Q You were in court this morning before Justice Sandifer.

A An attorney to appear in court. There was nobody to hand me something to say I had to be here.

Q You say you were never given a subpoena to appear before this grand jury on any day?

A This morning?

Q On any day.

A On any day, yes.

Q You were given a subpoena?

A Months back.

Q Months back?

A Not this morning.

Q That subpoena said "Investigation into the death of Joseph Gallo," didn't it?

A Yes.

Q You were in court this morning, weren't you, in Part XXX of the Supreme Court?

A Yes.

Q You heard argument about this matter before Justice Sandifer in Part XXX?

A Is that his name?

Q Do you know the judge's name?

A No.

Q The judge who was presiding in Part XXX, didn't you hear the argument before him by your attorney and myself?

A Yes, but I didn't know what was going on there.

Q You had no idea what was going on?

A Not really. I knew my lawyer was trying to help me, I imagine.

Q What did you think was going on in that room?

A You was trying to send me to jail and he was trying to keep me out.

Q That was what your understanding of that proceeding was?

A Yes.

Q What is your understanding of this proceeding?

A You are trying to send me to jail again.

Q Is that what you understand of this proceeding is?

A I imagine so.

Q You were standing right at the bar, right in back of your lawyer, when the argument concerning this matter of the grand jury subpoena was discussed before the judge, weren't you?

A Right. You were talking about law.

Q And the judge directed you to come into the grand jury room and answer questions, didn't he?

A Definitely.

Q You understood that?

A Yes.

Q And that was about this investigation into the death of Joseph Gallo this grand jury is conducting, isn't that correct?

A If you say so.

Q Well, isn't that what you understood when you were up in court?

A No; you told the judge to tell Mr. Langella to answer the questions and I am here to answer questions.

Q What did the judge say?

A For me to come and answer your questions.

Q And answer the questions, right?

A Right.

Q Is there anything about these questions you don't understand?

A I don't understand why I can't go out and talk to my attorney.

Q Is that your answer to all these questions?

A Let us take them one at a time.

Q We have taken several questions one at a time. Is there anything you don't understand about the questions?

A (No response)

Q Is there anything you don't understand, Mr. Langella?

A As far as what?

Q You tell us, please. You are the one who indicates you would like to talk to your lawyer.

A Give me a question and I will go out and talk to him and I will answer the question.

Q Have you been receiving messages from Joseph Gorgone?

A Can I speak to my attorney about that?

Q Is there anything you don't understand about that question?

A I can't understand why you won't let—you will not allow me to speak to my attorney. I believe that is my right.

FOREMAN: The jury instructs you to answer the question.

THE WITNESS: Mr. Foreman, I believe that is my right to leave the room after each and every question.

FOREMAN: You may leave the room if you don't understand the question. If you want your attorney to explain the question to you. Is there anything about Mr. Tanenbaum's question you don't understand, the question itself?

THE WITNESS: I would like my attorney to explain it to me.

Q In other words, you don't understand the question, is that what you are telling us?

A I would like to speak to my attorney.

FOREMAN: Do you understand the question? The

grand jury would like to know if you understand the question.

THE WITNESS: I would like my attorney to explain it to me, please.

Q . What is it you don't understand?

A I don't understand why you want to send me to jail.

Q . What is it about the question you want your lawyer to explain to you?

A About this one, who is his name? What's his name?

Q What is his name, you tell us.

A I don't know. I don't know any more. By the time I leave that room you confuse me. I don't even know what to ask my lawyer about it. You give me one at a time and I could answer each and every question.

Q Have you been receiving messages from Joseph Gorgone?

A Gorgone?

Q Yes, also known as Joe Black.

A Can I go out and speak to my attorney?

Q What don't you understand about the question?

A I don't understand why you won't let me leave the room.

Q Is there anything you don't understand about the question?

A I want to speak to my attorney.

FOREMAN: I think if you don't understand the question, Mr. Langella, we will permit you to speak to your attorney. Do you understand the question?

THE WITNESS: I would like to speak to my attorney.

FOREMAN: You don't understand the question?

THE WITNESS: I said I would like to speak to my attorney.

FOREMAN: The grand jury instructs you to answer the question.

THE WITNESS: After I speak to my attorney I will definitely answer the question.

Q Are you refusing to answer this question now, Mr. Langella?

A You said it. I didn't say it.

Q The foreman has directed you to answer the question. Have you been receiving messages from Joseph Gorgone, also known as Joe Black?

A After I speak to my attorney I will answer the question.

Q Are you presently refusing to answer the question?

A You said it, I didn't.

Q Mr. Langella, have you spoken to Mr. Gorgone, also known as Joe Black, on the telephone and have conversations with him concerning the murder of Joseph Gallo?

A I would like to speak to my attorney.

FOREMAN: You are directed to answer the question.

THE WITNESS: After I speak to my attorney I will answer any question.

Q Is there anything about the question you do not understand?

A I don't understand why you won't allow me to speak to my attorney.

FOREMAN: We have allowed you three times to leave the room and speak to your attorney. If you understand the question we will be happy to let you speak to your attorney.

THE WITNESS: I am under the impression that every question you ask me I have the right to leave the room. I have the right to leave the room and ask my attorney for advice because that is what he is here for, to advise me as to

what to do after each and every question. And Mr. Tanenbaum could tell you that.

Q Is that your answer to the question?

A I would like to speak to my attorney.

Q That is your answer to the question?

A I want to talk to my attorney?

Q Yes.

A In reference to what now?

Q Will you tell us? You want to talk to your lawyer.

A Tell me the question and I will go out and ask him.

Q What do you want to talk to him about?

A About the question you want to ask me.

Q About any question?

A I can't go out there—he is going to ask me the question.

Q You just want to talk to him about any question posed to you, is that what you are telling this grand jury?

A You are confusing me now.

Q Is that why you are telling this grand jury that you want to ask your lawyer about every question that is posed to you here, regardless of whether or not you understand it? Is that what you are telling this grand jury?

A If you give me the question, Mr. Tanenbaum—

Q Do you understand what I just said, Mr. Langella?

A I am trying to tell you something and—

Q Do you understand what I just said?

A Not really. What did you say now?

Q Is it your intention to go out and talk to your lawyer after every question is asked of you, regardless of whether or not you understand it? Is that your intention?

A Is it my right?

Q Is that your intention?

A I am asking you, is it my right?

Q Is that your intention? Will you please just answer that question?

A I would like to talk to my lawyer about that also.

Q Is that what you are telling this grand jury, Mr. Langella?

A (No response)

Q Do you understand the question?

A You asked me so many questions. I don't even know what you are asking me.

Q Is it your intention to speak with your lawyer after every question is put to you, regardless of whether or not you understand it?

A Not really.

Q What is it you don't understand about the question posed to you: Have you been receiving messages from Joe Gorgone, also known as Joe Black?

A I want to talk to my lawyer.

Q What is it you don't understand? We are trying to help you understand the question. It's a very simple question. What is it you don't understand?

A I don't understand why you will not allow me to go out and talk to my attorney. I would love to know why.

Q Is that what you don't understand?

A Yes.

Q You understand everything else?

A Look, I don't know why you will not let me go out.

Q Do you understand everything else?

A As far as what?

Q As far as everything that has been going on in this grand jury.

A Not really.

Q What don't you understand?

A I don't understand what is going on, period.

Q What don't you understand?

A That you are accusing me of doing things.

Q What is it that anybody has accused you of?

A Participating in the death of—

Q Auestions have been asked of you. No one has accused you of anything. You are a witness in this proceeding, that has been explained to you both here and before you came here in the court.

A A witness is one thing. You are saying did I have any knowledge—did I participate in the death of one—

Q That's correct, that is one of the questions that was asked of you.

A I know.

Q Is there anything about that that you don't understand?

A Yes.

Q You understand that?

A Definitely.

Q The only thing is you don't understand why you can't go out and talk to your lawyer after each and every question, isn't that fair?

A That is the reason why you want to send me to jail. I have nothing to do with—

Q Is that what you think?

A That is what you are trying to do.

Q What makes you say that, tell the grand jury?

A The questions you are asking me.

Q From the questions that are being asked of you?

A Yes.

Q And you feel because of those questions that someone is trying to put you in jail?

A No, you are trying to trick me because you know I am not an educated fellow.

Q How am I or any of the grand jurors or the foreman trying to trick you, will you please tell us that?

A Because you—you asked me a question and you know I'm all nervous.

Q You are sitting there very calmly, Mr. Langella.

A I am nervous, very nervous.

Q Is it you intention to talk to your lawyer after every question is put to you, regardless of whether you understand the question or not?

A No, of course not. If I understand the question I will answer it.

Q You will answer it. You will only say you want to talk to your lawyer when you don't understand the question, is that it?

A That's right.

A Yes.

Q And you feel because of those questions that someone is trying to put you in jail?

A No, you are trying to trick me because you know I am not an educated fellow.

Q How am I or any of the grand jurors or the foreman trying to trick you, will you please tell us that?

A Because you—you asked me a question and you know I'm all nervous.

Q You are sitting there very calmly, Mr. Langella.

A I am nervous, very nervous.

Q Is it your intention to talk to your lawyer after every question is put to you, regardless of whether you understand the question or not?

A No, of course not. If I understand the question I will answer it.

Q You will answer it. You will only say you want to talk to your lawyer when you don't understand the question, is that it?

A That's right.

Q And you have so indicated on the record; is that correct?

A Yes.

Q Everything else you understand, except; when you have a question and you have asked to talk to your lawyer; is that correct, Mr. Langella?

A Yes.

Q Thank you. Now I ask you again: Have you had any communication with Joseph Gorgone, also known as Joe Black?

A That I would like to talk to my attorney about.

Q What is it you don't understand, could you tell us that?

A I don't understand why you will now allow me to leave this room and talk to my attorney, which is my right to leave this room after each and every question. You are trying to banter words with me. You are going to make me answer questions which I don't even know what I am saying yes or no. Is this what you want? I want to give you a fair and square deal here.

Q Mr. Langella, please go out and talk to your lawyer.

A Thank you. About what is that name, Joe Galgone (phonetic)?

(Witness leaves grand jury room at 4:20 p.m. and returns at 4:30 p.m.)

THE WITNESS: Mr. Tanenbaum, I would like to clear up one thing.

MR. TANENBAUM: The record should reflect that my watch is five minutes fast. However, the time spans, to the best of my knowledge, have been accurate.

Q Have you conferred with your lawyer?

A Yes. And he told me to explain with me and Alieboy about you saying I'm his bodyguard. We are just close friends. We go everywhere together.

Q By Alieboy, whom are you referring to?

A Alphonse Persico.

Q Now, you have conferred with your lawyer; is that correct?

A Yes, I did.

Q You have a yellow sheet of paper in your hand. Is there anything you would like to tell the grand jury?

A No, I will wait for your questions.

Q You will wait for the question?

A Yes.

Q The question is: Have you been receiving messages from Joseph Gorgone, also known as Joe Black, about the murder of Joseph Gallo?

A Is that question about Joseph Galgone based on electrical surveillance or wire taps or bugs?

Q Is that your answer to the question?

A My lawyer says he believes that before we go any further as of this matter, we should go before the judge.

FOREMAN: You are directed by this grand jury to answer the question, Mr. Langella.

THE WITNESS: My lawyer says before we go any further with this matter we should go before the judge.

Q Mr. Langella, the question is perfectly clear. Have you been receiving messages from Joseph Gorgone, also known as Joe Black, about the murder of Joseph Gallo?

A My lawyer said before we go any further we should go before the judge.

Q Is there anything you don't understand about the question?

A My lawyer said before we go any further we should go before the judge.

Q Do you understand the question, Mr. Langella?

A My lawyer said before we go any further we should go before the judge.

Q Can we have your lawyer's name for the record, please?

A Gene Gallina. Gino Gallina.

Q Is there anything you do not understand about the question, please?

A My lawyer said before we go any further we should go before the judge.

Q You understand that you are a witness here before this grand jury and not your lawyer; do you understand that?

A My lawyer said before we go any further we should go before the judge.

Q And that in the interest of fairness I instruct you that if you refuse to answer the question you can be held in contempt, do you understand that?

A My lawyer said before we go any further we should go before the judge.

Q Any question that you would refuse to answer you can be charged with contempt. And contempt is a crime, do you understand, Mr. Langella?

A My lawyer said before we go any further we should go before the judge.

Q Is that your answer to the question, Mr. Langella?

A My lawyer said before we go any further we should go before the judge.

FOREMAN: You are instructed by the grand jury to answer the question.

THE WITNESS: My lawyer said before we go any further we should go before the judge.

FOREMAN: Mr. Langella, when you agreed to go outside to speak to your attorney you agreed to come back here and answer the questions of the grand jury. You specifically told this grand jury that after you spoke to your attorney you would answer any questions that the district attorney had for you. Now will you kindly answer the question?

THE WITNESS: Mr. Foreman, I believe I answered Mr. Tanenbaum about ten times that my lawyer instructed me to go before the judge.

Q Is that your answer to the question, Mr. Langella?

A My lawyer informed me to go before the judge.

FOREMAN: In connection with what, Mr. Langella?

THE WITNESS: About—let me get it out, please. The question was asked if I got any messages from one Mr. Joe Galgone. I asked is that question based upon wire taps, surveillance or—no, illegal wiretap, surveillance, bugs?

Q Is that your answer to the question?

A No, my lawyer—

Q Is that; your lawyer's answer or your answer?

A My lawyer said he believes before we go any further as to this matter we should go before the judge.

FOREMAN: You mean in connection with the question that Mr. Tanenbaum just asked?

THE WITNESS: He said we should go before the judge.

Q In connection with Mr. Tanenbaum's question?

A As of Joe Galgone, he wanted to know whether you have any wiretap, illegal device.

FOREMAN: Maybe Mr. Tanenbaum will ask you questions not related to—

Q How long have you known Joe Galgone, also known as Joe Black?

A I will gave to ask my lawyer.

FOREMAN: You agreed before you left the room you would answer the question if we permitted you to talk to your attorney. Mr. Tanenbaum is asking you a specifically different question. The grand jury instructs you to answer the question.

THE WITNESS: Can I ask you something, Mr. Foreman? Am I allowed to go out of this room after each and every question, yes or no?

Q Mr. Langella, as I explained to you, the law in New York State is clear. You can talk to your lawyer if you don't understand the legal matters before the grand jury, and if you don't understand the relevance of any question concerning the investigation that this grand jury is conducting.

A I have no right to go out there?

Q Do you understand what I just said?

A Do I have a right to go out?

Q Do you understand what I just said?

A Do I have a right to go out?

Q I just explained to you when you have the right to go outside and talk to him.

A I would like to go out now.

Q What is it you don't understand?

A I don't understand why; you will not allow me to go

out and talk to him after each and every question.

Q That is what you don't understand?

A Definitely.

Q Everything else you understand, certainly you can answer that.

A You are answering the questions for me. You are not making me answer.

Q Do you understand everything else besides that?

A I don't understand why I am not allowed to go outside the room and ask my attorney for advice. That is what he is out here for.

FOREMAN: You are directed to answer the question by the grand jury.

THE WITNESS: I want to speak to my attorney.

MR. TANENBAUM: Mr. Langella, would you step outside?

(WITNESS EXCUSED.)

Supreme Court, U. S.
FILED
APR 6 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. [redacted] 76-1096

JERRY LANGELLA,

Petitioner,

against

COMMISSIONER OF CORRECTIONS,
STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013
(212) 732-7300

PETER L. ZIMROTH
HENRY J. STEINGLASS
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	2
Langella's Motion to Quash His Grand Jury Subpoena	2
Langella's Appearance in the Grand Jury	3
Contempt Charges	4
The State Appellate Proceedings	6
Proceedings in the Federal District Court	7
The Appeal to the Second Circuit	9
Subsequent Proceedings	13
Argument	16
I—The Court should not consider petitioner's claim relating to what is required by federal law when a witness in a state grand jury proceeding objects to questioning as based on illegal eavesdropping. This claim was not briefed below. Also, petitioner did not object to the questions which became the subject of his indictment for contempt	17
II—Petitioner's Fifth Amendment claim should not be considered because he gave no substantial testimony which could have been "used" by the grand jury to indict him	21
III—Langella's claims should not be considered because he pleaded guilty in state court	23
Conclusion	25

TABLE OF AUTHORITIES

PAGE

Cases:

Blackledge v. Perry, 417 U.S. 21 (1974) 24
Burns, Matter of, 50 A.D.2d 527 (1st Dept. 1975) 18
Berry, In re, 521 F.2d 179 (10th Cir.), *cert. denied*, 423 U.S. 928 (1975) 18

Cameron v. United States, 231 U.S. 710 (1914) 21

Gelbard v. United States, 408 U.S. 41 (1972) ..2, 5, 8, 9, 11, 18
Glickstein v. United States, 222 U.S. 139 (1911) 21
Grand Jury (Freedman), In re, 529 F.2d 543 (3rd Cir. 1976) 18

Kastigar v. United States, 406 U.S. 441 (1972) 21

Langella v. Supreme Court, 76 Civ. 5415 14
Lefkowitz v. Newsome, 420 U.S. 283 (1975) 23, 24
Lochiatto, In re, 497 F.2d 803 (1st Cir. 1974) 18

Menna v. New York, 423 U.S. 61 (1975) 24
Millow, In re, 529 F. 2d 770 (2d Cir. 1976) 18
Mintzer, In re, 511 F.2d 471 (1st Cir. 1975) 19

People v. Einhorn, 35 N.Y.2d 948 (1974) 6, 7, 11, 12, 18
Persico, In re, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974) 9

Santiago, In re, 533 F.2d 727 (1st Cir. 1976) 18

Tollett v. Henderson, 411 U.S. 258 (1973) 23

United States v. Bryan, 339 U.S. 323 (1950) 21

Westerberg v. District Court, 506 P.2d 746 (1973), *cert. denied*, 414 U.S. 1162 (1974) 18

PAGE

Other Authorities:

Federal Rules of Appellate Procedure: (Rule 41(b) 14, 15

New York Criminal Procedure Law:
Section 50.10 3
Section 190.35 3
Section 190.40 ..... 3, 22
Section 190.45 3
Section 440.10(2)(a) 14
Section 440.10(2)(c) 14
Section 710.70(2) 24

New York Penal Law, Section 215.51 4

18 U.S.C. Section 3504(a)(1) 18

18 U.S.C. Section 6002 21

28 U.S.C. Section 2515 ..... 8, 9

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1076

JERRY LANGELLA,

Petitioner,

against

COMMISSIONER OF CORRECTIONS, STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Jerry Langella, having pleaded guilty in state court to contempt charges for refusing to answer questions before a grand jury, seeks a writ of certiorari to review an order of the United States Court of Appeals for the Second

Circuit (SMITH, OAKES and MESKILL, JJ.), entered November 22, 1976. The Second Circuit unanimously affirmed a judgment of the United States District Court for the Southern District of New York (BRIEANT, J.), entered May 12, 1976, denying Langella's petition for a writ of habeas corpus.

Statement of the Case

Langella's Motion to Quash His Grand Jury Subpoena

Langella was subpoenaed to appear before a New York County grand jury investigating the murder of Joseph Gallo in a Manhattan restaurant on April 7, 1972. Langella moved to quash the subpoena. Langella contended that under *Gelbard* v. *United States,* 408 U.S. 41 (1972), he was entitled, prior to appearing in the grand jury, to a preliminary hearing to determine the lawfulness of electronic surveillance which might be used to question him (A19*).

The motion was heard on December 19, 1972. The prosecutor stated that he had informed Langella's attorney that electronic surveillance used in the investigation had been pursuant to court order (A22). Langella then asked the court to examine the court order, supporting affidavit and tapes to determine whether all surveillance was pursuant to a legitimate order and whether sealing and "all the proctocol" had been properly performed (A25-26, 27). The court (SANDIFER, J.) queried whether Langella had a right to challenge the legality of questioning before any questions had been asked (A19, 21), and concluded that Langella was not entitled to the hearing he had requested (A33-35). The motion to quash the subpoena was denied, and Langella was directed to appear before the grand jury (A35).

* References preceded by "A" are to Petitioner's Appendix in the Second Circuit.

Langella's Appearance in the Grand Jury

Later that same day, December 19, 1972, Langella appeared before the grand jury. New York's provision for "automatic" "transactional" immunity* was explained to him, but he did not respond to questioning and repeatedly asked to consult with his attorney (24a-48a**). After sev-

* N.Y. CPL Sec. 190.40 provides:

> 1. Every witness in a grand jury proceeding must give any evidence legally requested of him regardless of any protest or belief on his part that it may tend to incriminate him.
>
> 2. A witness who gives evidence in a grand jury proceeding receives immunity unless:
>
> (a) He has effectively waived such immunity pursuant to section 190.45; or
>
> (b) Such evidence is not responsive to any inquiry and is gratuitously given or volunteered by the witness with knowledge that it is not responsive.
>
> (c) * * *

N.Y. CPL Sec. 50.10 provides:

The following definitions are applicable to this article:

> 1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.

The definition in CPL 50.10 applies to CPL 190.40 (see CPL. Sec. 190.35).

** References followed by "a" are to pages of the Appendix to the Petition for a Writ of Certiorari.

eral consultations with his attorney (27a, 32a, 49a), Langella answered some of the questions puto to him (33a, 34a, 49a). He denied involvement in the killing of Gallo. However, Langella refused to answer two questions: first, whether he had visited a certain apartment in Nyack, New York, in April 1972, and second, whether he had spoken with one Joseph Luparelli in that apartment (49a-51a).*

There ensued a lengthy colloquy between Langella and the questioner (51a-65a) and then still another consultation between Langella and his attorney (66a). Thereafter, the question whether Langella had been receiving messages from Joseph Gorgone about the murder of Gallo, which had been asked earlier but not responded to, was repeated. Langella then asked, "Is that question about Joseph Galgone [sic] based on electronic surveillance or wiretaps or bugs?" (66a). Langella said that his lawyer told him that "we should go before the judge" (66a, 67a, 68a). "As of Joseph Galgone [sic], he [my lawyer] wanted to know whether you have any wiretap, illegal device" (69a). Langella was excused without answering the question whether he had received messages from Gorgone (69a-70a).

Contempt Charge:

On January 16, 1973, Langella was indicted in state Supreme Court, New York County, for criminal contempt (N.Y. Penal Law §215.51) for his categorical refusal to answer two questions: whether he had visited the Nyack apartment in April 1972 and whether he had spoken to Luparelli in the apartment. None of the charges were based

* According to the indictment later returned, other evidence received by the grand jury indicated that one of Gallo's killers had been hiding in that apartment. Indictment No. 238/73 (A10).

in any way on Langella's refusal to answer the question whether he had been receiving messages from Joseph Gorgone—the only question to which Langella had raised an objection based on illegal wiretapping.

After his indictment, Langella moved for pretrial discovery of applications, orders and transcripts for any electronic surveillance "in order to determine whether the defendant's refusal to answer questions asked of him before the grand jury was lawful and proper under *Gelbard* * * *" (Afft. of Nancy Rosner, Esq., March 7, 1973, p. 2). He received a transcript of an intercepted conversation and a court order authorizing the interception (Petition, p. 9). However, Langella did not move to suppress any evidence. Nor did he make any motion to dismiss the indictment, or any other pretrial motion, claiming that his questioning in the grand jury was in fact based upon illegal electronic surveillance.

Instead, Langella moved to dismiss the indictment on four other grounds:

(1) Langella claimed that, at the time of his grand jury appearance, he had the right to refuse to answer questions until there was a prosecutorial certification, and a judicial determination, that questions were not based upon illegal electronic surveillance. This claim was rejected on the ground that "the district attorney ha[d] already answered the crucial question as to electronic surveillance before the witness in open court prior to the appearance before the grand jury * * *" (A14).

(2) Langella claimed that his privilege against self-incrimination was violated because the indictment was returned by the same grand jury which had heard him testify. This claim was also rejected (A15).

(3) Langella claimed that his Sixth Amendment right to counsel had been violated because he was not permitted to consult with counsel during his grand jury appearance. This claim was rejected without discussion.

(4) Finally, Langella claimed that he had not been advised by the questioner concerning the scope of immunity in other jurisdictions. This claim was also rejected without discussion.*

On June 18, 1975, Langella pleaded guilty to the indictment. On July 24, 1975, he was sentenced to a term of five months' imprisonment.

The State Appellate Proceedings

On appeal to the Appellate Division, First Department, Langella presented only the first three of the claims he had made in his pretrial motion.

In support of his first claim, Langella relied heavily upon the decision of the New York Court of Appeals in *People* v. *Einhorn,* 35 N.Y. 2d 948 (1974), in which it was stated:

> The request during the grand jury proceeding by the witness that he be brought before the court must be respected and once there the presiding justice may

* The opinion by Justice George Roberts denying the pretrial motion is reproduced at A12-15.

> make appropriate inquiry whether the witness' objection is sound. In the course of that inquiry, the court, may in its discretion interrogate the prosecutor under oath, either *in camera,* or in open court, whether or not the basis for the questioning of the witness was founded on the illegally obtained wiretap evidence. 35 N.Y. 2d at 949-950.

In response to the first claim, the State pointed out that Langella was not arguing on appeal that the questions he refused to answer were in fact based on illegal electronic surveillance. Rather his claim was procedural—that at time of his grand jury appearance he was denied a judicial ruling on whether questions were based on illegal electronic surveillance. The State maintained that Langella was not entitled to a judicial ruling under *Einhorn.* His request for such a ruling on a motion to quash his grand jury subpoena was premature because he had not yet appeared in the grand jury and been asked specific questions. When Langella did appear in the grand jury and was asked the questions which became the subject of his contempt indictment, he made no objection that those questions were based upon illegal electronic surveillance. Nor did he ask for a judicial ruling with respect to those questions. Instead, he categorically refused to answer.

The state also answered on the merits the other two claims raised on appeal. In addition, however, the state argued that none of Langella's three claims could be reviewed on appeal after his guilty plea.

On March 4, 1976, Langella's conviction was affirmed by the Appellate Division without opinion. Leave to appeal to the New York Court of Appeals was denied on April 13, 1976.

Proceedings in the Federal District Court

On April 20, 1976—the day he was scheduled to surrender in state Supreme Court to begin serving his sentence—Langella commenced the instant habeas corpus proceeding in the United States District Court for the Southern District of New York, seeking to vacate his conviction. In his habeas petition, Langella presented the same three claims he had raised on appeal in the state court.* *Ex parte,* Langella obtained from the District Court a stay of his surrender to state authorities.

On the return date, April 23, 1976, in order to expedite consideration of the petition, it was agreed that the matter would be submitted upon the briefs filed in the Appellate Division. There being no disputed factual questions, an evidentiary hearing was unnecessary. The District Court continued the stay of Langella's surrender pending a ruling on the petition.

On May 12, 1976, the District Court denied the petition. The Court declined to view Langella's plea of guilty as a bar to review (14a-15a), but rejected Langella's three claims on their merits. With respect to Langella's first claim (concerning the procedures followed at the time of his grand jury appearance), the Court stated:

* The three claims Langella presented to the District Court and to the Appellate Division were identical since Langella "annexed to this habeas corpus petition and made a part of hereof as if fully set forth herein" his Brief and Appendix in the Appellate Division. Petition for Writ of Habeas Corpus, paragraph 6 (footnote omitted). The petition itself merely made passing reference in paragraph 6(i) to 28 U.S.C. Sec. 2515, *Gelbard* v. *United States, supra,* and the Fourth and Fifth Amendments, and relied on Langella's Brief in the Appellate Division to set forth his claims.

> Neither *Gelbard* nor §2515 require the state court to quash a grand jury subpoena upon the speculation that the questions to be asked are derived from a tainted source. 408 U.S. at 60-61, 92 S. Ct. 2357. (16a)

The Court further stated:

> Although a federal district court may be required to follow the *Persico* [*] procedure, neither *Gelbard* nor federal statute requires that state courts observe a similar procedure. The state prosecutor's oral representation that electronic surveillance was employed, but conducted pursuant to court order, was constitutionally sufficient even if a different procedure would be required of federal prosecutors. (18a).

With respect to Langella's second claim, the District Court held that the same grand jury which heard Langella's responsive answer to "a meager number of questions" (20a), could properly consider the entire record of his appearance to determine "whether the questions were proper, and whether the witness acted with the requisite specific criminal intent" (20a).**

Although finding Langella's claims "wanting in merit," the Court granted a certificate of probable cause and continued the stay of Langella's surrender pending appeal (23a).†

* *In re Persico,* 491 F.2d 1156 (2d Cir.), *cert. denied,* 419 U.S. 924 (1974).

** With respect to Langella's third claim, the District Court held that, even if a grand jury witness has a constitutional right to consult counsel, Langella had had several conferences with his attorney during his grand jury appearance and was not denied that right (21a-22a).

† The District Court's opinion is reported at 413 F. Supp. 1214.

The Appeal to the Second Circuit

In the Second Circuit, Langella made two claims. Although the first claim related to the subject of electronic surveillance, it was very different from the claim Langella had pressed in the District Court (and in the state courts). He no longer asserted, as he had before, that at the time of his grand jury appearance, he was denied a judicial ruling on whether there had been illegal eavesdropping. Indeed, he explicitly stated that he was "leaving aside the difficult procedural questions concerning a witness' right to pre-testimony inquiry concerning electronic surveillance * * *." (Brief at 14). Instead, Langella asked the Second Circuit to reverse the denial of his habeas petition on the ground that his questioning in the grand jury was in fact based upon illegal electronic surveillance. Without any support in the record, it was asserted in Langella's brief that at a calendar appearance in the state court prior to Langella's plea of guilty on June 18, 1975, the prosecutor had "conceded, for the purposes of the [pretrial] motions, that the electronic surveillance, though pursuant to court order, *was unlawful*" (Brief at 13; emphasis in original). Langella's brief stated (at p. 13, n.) that counsel did "not have the minutes of this calendar appearance to include in the appendix but expects to have them before oral argument."*

In response, the State argued that Langella's new claim should not be considered because it had not been presented to the District Court or to the state courts.

* No such minutes were produced before or at oral argument on September 13, 1976, or afterwards, though the Court stated it would accept the minutes even after argument.

Langella's previous claim concerning the procedures followed at the time of his grand jury appearance was not briefed by either party because Langella had explicitly left that issue "aside."

In the Second Circuit, Langella raised a second issue which had been raised in the previous state and federal court proceedings—that his indictment by the same grand jury which heard his testimony violated his Fifth Amendment right against self-incrimination. The state responded to this claim on the merits.

In addition, as in the District Court, the State argued that none of the claims raised by Langella should be reviewed in a federal habeas corpus proceeding because Langella had pleaded guilty in state court.

On November 22, 1976, the Second Circuit affirmed the District Court's denial of the habeas petition. The Court's opinion first concluded that Langella's guilty plea did not prevent consideration of the merits of his claims (4a-5a). The Court then addressed the question, which Langella had expressly "[left] aside" and which had not been briefed, of whether the state had followed permissible procedures in its grand jury proceeding. The Court held that the procedures were permissible.

> The hearing here occurred before *Einhorn* which would today govern the procedure in the New York courts in a similar case. Justice Sandifer's denial of Langella's pre-appearance motion, on the prosecutor's assurance of the existence of a court order for the electronic surveillance, essentially meets the requirements of *Einhorn* and constitutes a sufficient accommodation of the needs of the grand jury with those of the witness. *Gelbard* v. *United States,* 408 U.S. 41, 70

(1972) (White, J., concurring). Moreover, Langella failed thereafter to make a timely request for further determination as to the source of the two questions which were the subject of the contempt indictment. * * * After consulting his lawyer, he persisted in evading answers, but not on any claim the questions were based on illegal surveillance. Later, after being asked about one Gorgone, a/k/a Black, he asked to see a judge to determine whether that question arose from illegal surveillance. Here there was a sufficient compliance with the requirements of *Einhorn* on the earlier motion, and nothing new was raised before the grand jury to require a new hearing as to the source of the particular questions the witness refused to answer, which refusal was the basis of the contempt conviction. (7a-8a).

The Court concluded that, although Langella had objected to the question about receiving messages from Gorgone, he did nothing to alert the grand jury or the prosecutor that his objection of illegal eavesdropping applied to the earlier questions which became the subject of his contempt indictment.

> When the grand jury asked Langella whether he had been receiving messages from Joseph Gorgone about the murder of Joseph Gallo, Langella, after consulting for the fourth time with his attorney, asked whether the question was based on electronic surveillance and requested that he be taken before a judge. His request was denied. Upon his continuing to be recalcitrant and to request that he be taken before a judge, he was excused by the grand jury. But the two questions for which Langella was held in contempt were asked earlier in the grand jury proceedings [31a, 40a, 43a, 46a, 47a, 49a-50a]. Although he had already consulted three times with his attorney, Langella never told the grand jury that his refusal to answer these two questions was based on his claim that they were the product of an illegal electronic surveillance. (6a-7a)

The Court did not discuss Langella's claim (the one he briefed) that the questions which were the basis for his contempt conviction were in fact based upon illegal electronic surveillance.

The Court also rejected Langella's claim that his rights under the Fifth Amendment were violated because the same grand jury which heard him testify also returned an indictment charging him with contempt. The Court thought it necessary for a grand jury considering contempt charges to know the extent of the witness' answers to questions and advantageous to observe the witness' demeanor in evaluating whether a refusal to answer was deliberate and contemptuous (8a-9a).

Subsequent Proceedings

On November 26, 1976, Langella filed a petition for rehearing in the Second Circuit, thereby obtaining, under Rule 41(a), Federal Rules of Appellate Procedure, an automatic stay of the issuance of the Second Circuit's mandate. Rehearing was requested to consider still another claim concededly not previously presented to the Second Circuit or considered by it (Petition for Rehearing, p. 5). The petition for rehearing was denied on December 1, 1976.*

---

* The claim in the petition for rehearing was the same as the fourth claim in Langella's pretrial motion—that during Langella's grand jury appearance he was not advised by the questioner of the scope of his immunity in jurisdictions other than New York, see above p. 6. Langella had withheld this claim from his direct appeal

(footnote continued on next page)

Langella then applied to the Second Circuit pursuant to Rule 41(b), FRAP, for a stay pending determination of a petition to be filed by Langella in this Court for a writ of certiorari. On December 21, 1976, the Second Circuit granted Langella's motion to stay issuance of its mandate pending application to this Court for a writ of certiorari. Under Rule 41(b), such a stay expires after thirty days. Langella did not file his petition for a writ of certiorari within thirty days, and the stay expired on January 20, 1977. On January 26, 1977, the mandate of the Second Circuit was issued. On January 27, the state court rejected Langella's contention that the mandate had been issued in error and that Langella had until March 1, 1977 to file his application to this Court and maintain the Second Circuit's stay. (March 1, 1977 was 90 days after his petition for

---

to the state courts, from his application to the federal district court, and from his appeal to the Second Circuit.

On December 6, 1976, Langella asserted this new claim in another federal habeas corpus petition, *Langella* v. *Supreme Court*, 76 Civ. 5415, and requested a "stay of all state court proceedings pending determination of this petition. * * *" (at p. 4). The State's motion to dismiss the petition for failure to exhaust state remedies was granted on December 15, 1976, in a memorandum (per FRANKEL, J.), which deemed "substantial" the State's "suggestion that petitioner may be 'manipulating the writ of habeas corpus in an effort to delay his surrender to State authorities' " (at p. 1).

Thereafter, Langella presented his new claim to the state courts in a post-conviction motion. Under state law, post-conviction motions like Langella's must be denied unless the movant asserts a reasonable justification for not having raised the claim on direct appeal. N.Y. C.P.L. §440.10(2)(c). This provision was called to defense counsel's attention by the District Attorney's Office and by the state judge before whom Langella's motion was made. Nevertheless, Langella refused to assert any justification for his failure to raise the claim on direct appeal. Instead, in the face of Judge Frankel's ruling to the contrary and in the face of what was demonstrable from the papers filed in the state courts, Langella claimed that he had in fact raised his new claim on direct appeal. Under another provision of New York law, CPL §440.10(2)(a), which was also called to defense counsel's attention, a post-conviction motion

(footnote continued on next page)

rehearing was denied on December 1, 1976.) Pursuant to the state court's order, Langella surrendered to state authorities and commenced serving his sentence.

The same day, January 27, 1977, Langella moved in the Second Circuit for a second stay pending filing of a petition for a writ of certiorari.*

On February 7, 1977, Langella filed the instant petition for a writ of certiorari. On February 8, 1977, the Second Circuit granted Langella's application for a second stay

---

must be denied if the same claim has been raised and rejected on the direct appeal. Langella, then, took a position which constrained the state court to reject his post-conviction motion without reaching the merits of his claim, and the state court so ruled. The Appellate Division denied leave to appeal.

Langella's maneuvers are part of a strategy to keep open the possibility of continuous federal litigation so that he can continue to seek stays of his surrender to state authorities. He withheld a claim until after the Second Circuit rejected his appeal from the denial of his first habeas corpus petition. When the stay of his surrender was about to expire, he asserted a new claim—first in a petition for rehearing and then in a second habeas corpus petition. On the basis of his second habeas corpus petition, he sought a further stay of his surrender although he had not exhausted state remedies. When his second habeas corpus petition was dismissed, he presented the new claim to the state courts in a manner calculated to ensure an immediate rejection. The state courts did reject the claim, and now Langella may return to federal court. Thus, Langella has maneuvered into a position, if this Court should deny the instant petition, to resubmit his federal habeas corpus petition and seek still another stay in the federal courts, where, as the history of this litigation shows, Langella has been successful in obtaining (even *ex parte*) stays of his surrender though his claims have been determined to be without merit.

* In support of this application for a stay, Petitioner's counsel claimed that he had "inadvertently" confused the 90-day period for filing the petition with the 30-day period of the stay granted December 21, 1976. However, counsel's application for the first stay had stated that the application to this Court would be made within 30 days, and the District Attorney's Office had also pointed out to Langella and his counsel that, under Rule 41(b), if Langella desired to continue his stay, he had to file in this Court within 30 days from December 21, 1976, when the first stay was granted.

pending disposition of his petition to this Court. Langella then applied to the District Court for a order terminating his incarceration, which was granted. Langella was released on February 10, 1977.

ARGUMENT

In this petition, Langella seeks to raise large issues concerning what procedures are imposed by federal law on state prosecutors and judges when a witness before a state grand jury refuses to answer, claiming that the questioning is based on illegal eavesdropping. Specifically, Langella contends that it is insufficient for a state prosecutor to respond to such a claim by stating that the eavesdropping was done pursuant to court order. Langella maintains that before a witness must answer questions, he is entitled to a more complete statement by the state prosecutor, under oath, and also a judicial ruling on whether questions are in fact based on illegal eavesdropping. If the state does not follow these procedures, according to Langella, the witness may not be charged with contempt for failing to answer the questions.

These issues should not be considered by this Court in this case because they were not briefed by either party below. In fact, Petitioner expressly left these issues aside in favor of the claim (not renewed in this petition) that the questioning was in fact based on illegal eavesdropping. Moreover, the record of the state grand jury proceeding does not adequately present the larger issues Petitioner seeks to raise.

Petitioner asks this Court to review a second claim—that his Fifth Amendment right against self-incrimination

was violated because he was indicted for contempt by the same grand jury which heard the testimony for which he had been given immunity. Again, the record of the state grand jury proceeding does not adequately present the issue Petitioner seeks to raise.

Finally, the Court should not grant the petition because, even if both claims were adequately presented, and even if they had merit, Petitioner would not be entitled to habeas relief because he pleaded guilty in state court.

I

The Court should not consider petitioner's claim relating to what is required by federal law when a witness in a state grand jury proceeding objects to questioning as based on illegal eavesdropping. This claim was not briefed below. Also, petitioner did not object to the questions which became the subject of his indictment for contempt.

This is not an appropriate case in which to consider what procedures are required by federal law when a witness before a state grand jury objects to questioning as based upon illegal eavesdropping. The issues concerning such requirements were not briefed in the Second Circuit because Petitioner "[left] aside" his claim concerning the procedures followed at the time of his grand jury appearance.

This Court should not consider issues like those raised by Petitioner unless they have already been subjected to thorough briefing and consideration. The need for thorough consideration below might be less clear if the issues raised by Petitioner had already been subjected to extensive litigation in the state and lower federal courts. In fact, however, other than in New York where the controlling case is

People v. *Einhorn, supra,* as far as we are aware, only Colorado has defined what procedures, if any, federal law imposes on state courts and prosecutors when a witness objects to questioning as based on illegal eavesdropping. *Westerberg* v. *District Court,* 506 P.2d 746 (1973), *cert. denied,* 414 U.S. 1162 (1975).*

Furthermore, the record of the state grand jury proceeding does not adequately present the issues Petitioner seeks to raise. The prosecutor's statement concerning electronic surveillance, which Petitioner urges this Court to find inadequate, was made in response to a motion to quash a grand jury subpoena. That motion was made before Petitioner had appeared in the grand jury or been asked any questions. At that stage, inquiry into the lawfulness of electronic surveillance was premature under New York and federal decisions. No statement by the prosecutor about electronic surveillance was required. *See People* v. *Einhorn, supra, Matter of Burns,* 50 A.D.2d 527 (1st Dept. 1975);** *In re*

* Since *Gelbard* v. *United States,* 408 U.S. 41 (1972), there have been several decisions concerning what a *federal* grand jury witness must do to "trigger" the *federal* prosecutor's obligation under 18 U.S.C. 3504(a)(1) to "affirm or deny the occurrence of the alleged unlawful act," and what a federal prosecutor must do to meet that obligation. *See, e.g., In re Millow,* 529 F. 2d 770 (2d Cir. 1976); *In re Santiago,* 533 F.2d 727, 729-730 (1st Cir. 1976); *In re Lochiatto,* 497 F. 2d 803 (1st Cir. 1974); *In re Grand Jury (Freedman),* 529 F. 2d 543, 549-550 (3rd Cir. 1976); *In re Berry,* 521 F.2d 179, 184-185 (10th Cir.), *cert. denied,* 423 U.S. 928 (1975). As stated in the District Court's opinion in this case (18a, n.4) and by the New York Court of Appeals in the *Einhorn case,* 35 N.Y. 2d at 949, n., Section 3504(a)(1) does not apply to proceedings in the state courts.

** *Burns* affirmed the denial of a motion to quash grand jury subpoenas "essentially for the reasons stated" by the court below. The lower court, in an opinion which is unreported, concluded that a subpoenee must appear in the grand jury and be questioned before he may object to questions as based on illegal eavesdropping and request to go before a judge for a ruling on his objection. The court did not permit the issue of illegal eavesdropping to be raised on a motion to quash a grand jury subpoena.

Mintzer, 511 F.2d 471, 472 (1st Cir. 1975). Accordingly, the denial of the motion to quash the subpoena was proper without regard to whether it was sufficient for the prosecutor simply to state that there had been court-ordered electronic surveillance.

After Langella's request for a judicial inquiry was denied as premature, he was ordered to appear before the grand jury. Even though the prosecutor had informed Langella and his counsel that there had been electronic eavesdropping, and even though Langella in fact made objection to one question at the end of his grand jury appearance, he did not object during his grand jury appearance to the two questions which became the subject of his contempt indictment. He categorically refused to answer these questions without objection of any kind. He certainly had sufficient opportunity to raise an objection because he did not refuse categorically to answer until after he had been asked these questions several times (31a, 40a, 43a, 46a, 47a, 49a-50a), and until after he had had three consultations with his attorney (27a, 32a, 49a).

The Second Circuit was clearly correct in determining that Petitioner failed to make a "timely request for further determination as to the source of the two questions which were the subject of the contempt indictment" (7a). Only long after he had categorically refused to answer these two questions (and not, as Petitioner says, in the "next round," Petition, p. 7) did Langella object to any question as based upon illegal electronic surveillance. When the objection was made, it was specifically directed to the entirely different question then being asked. Petitioner said: "Is

that question about [receiving messages from] Joseph Galgone [*sic*] based on electronic surveillance or wiretaps or bugs?" (66a). Petitioner added, "As of Joe Galgone [*sic*], he [my lawyer] wanted to know whether you have any wiretap, illegal device" (69a). There was nothing about what Langella said that could possibly have been taken as an objection to entirely different questions asked earlier in the proceedings. This is not a case, then, in which a grand jury witness, after being alerted by a later question that earlier questions he had refused to answer might have been based upon illegal electronic surveillance, seeks without success to object to those earlier questions.*

Thus, there is no occasion in this case to consider what the state prosecutor and court should have done if, instead of categorically refusing to answer the questions which became the subject of the indictment, Petitioner had given any indication that he was objecting to these questions as based upon illegal electronic surveillance.

* The Petition (p. 13), suggests that Langella did not object to the two questions about the Nyack apartment, which became the subject of his indictment, because he had no "clues" that he had been overheard until, after his refusal to answer those two questions, he was asked the question about receiving messages from Gorgone. What the Petition fails to point out is that the question about receiving messages from Gorgone was asked several times in the course of Langella's grand jury appearance without being objected to (47a, 59a, 60a, 62a, 65a), including once (47a) before he refused to answer the two questions about the Nyack apartment (49a-51a). In addition, Langella conferred with his attorney (48a) after being asked the question about Gorgone (47a) and before refusing to answer the two questions about the Nyack apartment for which he was indicted (49a-51a).

II

Petitioner's Fifth Amendment claim should not be considered because he gave no substantial testimony which could have been "used" by the grand jury to indict him.

Langella also claims that his Fifth Amendment right against self-incrimination was violated when he was indicted by the same grand jury before which he committed contempt. He maintains that the grand jury might have considered some of his answers and thus violated the prohibition on "use" of testimony for which he had been given immunity, *Kastigar* v. *United States,* 406 U.S. 441 (1972). Therefore, he maintains, he could be properly indicted only by another grand jury which was not aware of the answers he gave before the first grand jury.

As the Second Circuit noted, it is settled practice for the same grand jury which heard a witness testify to consider charges of perjury or contempt (8a). Moreover, there is a longstanding principle which permits testimony obtained under a grant of immunity to be used in a prosecution for perjury or contempt committed in the same proceeding in which the testimony was given, *see Glickstein* v. *United States,* 222 U.S. 139, 141-142 (1914), *Cameron* v. *United States,* 231 U.S. 710, 720-721 (1914), *United States* v. *Bryan,* 339 U.S. 323, 335-343 (1950), *Kastigar* v. *United States, supra.**

* The statute approved in *Kastigar* contained an exception which permitted use of compelled testimony "in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order" to testify. 18 U.S.C. Sec. 6002, quoted in 406 U.S. at 448-449.

Petitioner's reliance on cases involving use of immunized testimony in prosecutions for substantive crimes is misplaced, as both the Circuit (9a, n.8) and District (21a) Courts pointed out.

If this court desires to review these established practices and principles, this is not a good case to do so because Petitioner gave no substantial testimony which could have been considered by the grand jury in deciding to indict him. As the District Court noted, Langella "answered responsively to a meager number of questions" (20a). He testified before the grand jury "that he was a professional gambler [34a], that he had not filed income tax returns for a number of years [33a],* and that he was a close friend of Alphonse Persico [66a], a person alleged to have been involved in the subject murder investigation" (20a-21a).**

Langella made his guilt of criminal contempt abundantly clear to the grand jury by his categorical refusal to answer the questions concerning his visit to the Nyack apartment (49a-51a), and also by his persistent unresponsiveness to questions throughout his appearance.† On this record,

*As the District Court noted, this information was volunteered in an unresponsive answer to the question of what Langella's occupation was (20a, n.5). Accordingly, there was no immunity with respect to this testimony. N.Y. CPL Sec. 190.40.

** Langella also denied that he had planned the killing of Joseph Gallo, that he had spoken afterwards with Carmine DiBiase or Joseph Yacovelli (49a), and that he had discussed the murder of Gallo with Persico inside the Nyack apartment (52a-53a).

† At the outset, when asked his occupation, Langella at first said "I have to ask my lawyer that" (26a), then claimed on the same page of the record that "now I forgot the question" (26a). Although immunity had already been adequately explained by the prosecutor to Langella's stated satisfaction (*see* 24a-25a), and Langella had conferred with his attorney before (25a, 28a) and again during his grand jury appearance (27a), Langella still did not answer the question about his occupation, but instead himself asked questions about immunity (27a-29a).

Although immunity was again explained to Langella (29a-30a), he still did not answer the question about his occupation and claimed he had not even discussed it with his attorney during the conference

(*footnote continued on next page*)

there is only a remote and imaginary possibility that Langella's meager responsive answers were "used" by the grand jury in considering whether to indict him.*

III

Langella's claims should not be considered because he pleaded guilty in state court.

Federal habeas corpus relief is not generally available to a defendant like Petitioner whose conviction is based upon his plea of guilty in state court. *See Tollett* v. *Henderson,* 411 U.S. 258 (1973). There are two exceptions to this principle. First, where state law permits a claim to be reviewed on appeal even after a guilty plea, federal habeas review is available. *Lefkowitz* v. *Newsome,* 420

(29a-30a). Langella continued to refuse to answer questions (30a-32a) and, after yet another conference with his attorney (32a), asked more questions about immunity (33a). Langella persisted in being unresponsive (33a-48a), claiming that he had a right to talk to his lawyer after each question was asked (31a, 32a, 36a, 39a-40a, 44a-45a; *see also* 53a, 59a, 60a-61a). Langella also stated on several occasions that he had "cards" from his lawyer (28a, 33a, 49a, 54a, 66a), which he sometimes termed the "wrong card" (49a, 54a).

When excused to talk to his attorney for the third time, Langella laughed (48a) and claimed he "forgot" what to ask his lawyer about (48a). Langella then answered certain questions (49a), but refused to answer the two questions which became the subject of his indictment, as well as other questions (49a-51a). Thereafter, Langella repeatedly asked to consult with his attorney (51a-61a), again claiming that he "forgot" the question (52a, 53a, 62a).

* Petitioner incorrectly asserts that the state "conceded" that Langella's responsive answers were "used" by the grand jury in considering his indictment. What the state contended—and the Circuit (8a-9a) and District (20a) Courts agreed—is that the grand jury could properly consider the entire record of Langella's grand jury appearance, much of which was evasive, and Langella's demeanor, in determining whether his refusal to answer the questions concerning the Nyack's apartment was deliberate and contemptuous.

U.S. 283 (1975). New York's CPL §710.70(2), the provision at issue in *Newsome,* does permit appellate review of a motion to suppress evidence after a guilty plea. The two claims which Petitioner seeks to raise here, however, relate to procedure at the time of his grand jury appearance and to his indictment by the same grand jury which heard him testify. Such claims are not cognizable in a motion to suppress evidence, and Petitioner in fact made no such motion but presented his claims in a pretrial motion for dismissal. Under state law, the claims made in Petitioner's pretrial motion are not reviewable on appeal after a guilty plea. Accordingly, contrary to the conclusion reached by the courts below, these claims are not cognizable in a federal habeas corpus proceeding under the doctrine of *Lefkowitz* v. *Newsome, supra.**

Second, review is permitted of claims which, in their nature (like double jeopardy claims), would prevent defendants from even being brought into court, *see Menna* v. *New York,* 423 U.S. 61 (1975) (per curiam), *Blackledge* v. *Perry,* 417 U.S. 21, 30-31 (1974). Petitioner's claims constitute, at most, defenses to contempt charges. Neither claim, even if meritorious, would prevent him from being haled into court. Indeed, Langella's Fifth Amendment claim, if accepted, would by its terms not preclude his re-indictment by a different grand jury which was not privy to all his testimony.

* To support the conclusion that petitioner's claims were reviewable, the courts below referred to New York's provisions permitting the *trial court* to consider claims like petitioner's after a guilty plea for good cause shown (5a, 15a). However, unlike N.Y. C.P.L. §710.70(2), at issue in *Newsome,* the provisions relied upon by the courts below do not provide for appellate review of claims after a guilty plea.

Accordingly, Petitioner's claims do not entitle him to federal habeas relief from a state court conviction based upon his plea of guilty. Since Petitioner is not entitled to relief upon the claims he has presented, review of those claims should not be granted.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

PETER L. ZIMROTH
HENRY J. STEINGLASS
Assistant District Attorneys
Of Counsel

April, 1977